IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 550

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EDWARD R. ADAMS,
JOSEPH C. LAMY,
One North LaSalle Street,
Chicago, 2, Illinois,
HUGH V. MURRAY, JR.,
Centralia, Illinois,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. .....

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, George F. Wood, H. Glen Wood, Grace Schmidt and Leaffia Howe, respectfully pray for a writ of certiorari to review a final judgment of the Supreme Court of Illinois, the highest court of that State, entered on Sep-

tember 21, 1943. The judgment is the final act of the highest court in the Judicial Department of the State of Illinois and the last forum under the laws of that State in which petitioners may be heard in support of their rights. This petition, together with a certified transcript of the record of the case, are filed in this court within the prescribed three months.

I.

Summary and Short Statement of the Matters Involved.

This is an original suit commenced in the Circuit Court of Jefferson County, Illinois, for the purpose of cancelling, as a cloud upon the title to forty acres of land, a certificate of purchase and deed executed by the Master in Chancery of the Circuit Court of that county purporting to convey the land, to redeem from a decree for foreclosure entered therein and to cancel and remove other conveyances and recorded instruments as clouds upon the title to the land.

On October 20, 1931, William C. Wood and Margaret Wood, his wife, were the owners as tenants in common of a homestead consisting of forty acres of land in Jefferson County, Illinois. On that day they executed a mortgage of the land which was assigned to the respondent First National Bank of Woodlawn. On February 5, 1932, Margaret Wood died intestate leaving as her heirs, William C. Wood and her children who are the petitioners (Rec. 2, 3, 27, 49).

On November 29, 1935, First National Bank of Woodlawn commenced a suit to foreclose the mortgage in the Circuit Court of Jefferson County (Rec. 193-204). Personal service was obtained upon William C. Wood and the petitioners, H. Glen Wood, Grace Schmidt and Leaffia Howe. An effort was made to obtain service by publication on the petitioner, George F. Wood and wife (Rec. 205-210). Petitioner, H. Glen Wood, entered his appearance and filed

an answer through his counsel, Hassel B. Smith, (Rec. 211-213). The other defendants, including the petitioners herein other than H. Glen Wood, did not appear.

Rule 7 of the rules governing the Second Judicial Circuit of Illinois, in which Circuit is included the Circuit Court of Jefferson County, Illinois, in force and effect July 10, 1934, provides that except in cases of default, no order shall be entered in any cause without the presence of opposing counsel or upon proof of service of written notice upon attorneys of record for such opposite party (Rec. 354). Thus, H. Glen Wood's counsel became thereafter entitled to receive notice with respect to any subsequent order in the case.

On July 13, 1936, a decree for foreclosure was entered (Rec. 214-222). The decree required the defendants in the suit to pay the respondent bank the sum of $693.20 within thirty days and provided, in default thereof, that the land be sold at public vendue for cash in hand to the highest bidder at the west door of the Court House. The decree directed the Master in Chancery to execute the decree and give public notice of the time and place of the sale by publication of the same in a secular newspaper published in the county and posting notices as the law requires (Rec. 218, 219). Section 3 of the Illinois Statute, "Notices," effective September 13, 1874, provides:

> "Whenever notice is required by law or order of court and the number of publications is not specified, it shall be intended that the same be published for three successive weeks." (Illinois Revised Statutes, State Bar Association Edition, Chapter 100, Section 3.)

The Master in Chancery advertised the sale, (Rec. 306-308) and on September 5, 1936, the sale was held at the appointed time and place. At the sale the attorney for respondent bank bid the sum of $782.80 and petitioner, H. Glen Wood, bid the sum of $800 and this bid being the high-

est and best bid at the sale, the property was struck off to him and he was declared to be the purchaser and the sale was closed and the bidders ~~disbursed~~ dispersed (Rec. 132-136, 138, 144-145).

Petitioner, H. Glen Wood, failed to make payment of the amount of his bid and on September 21, 1936, the Master in Chancery wrote a letter to him stating that H. Glen Wood had bought the property and had failed to make payment of the sale price and that the Master in Chancery would allow him until the last of September to pay the sale price (Rec. 222, 223). Thereafter, on October 1, 1936, the Master in Chancery, without another advertisement and without conducting any other sale, filed a report of sale reciting that the mortgaged property had been sold to the First National Bank of Woodlawn for $782.80 and reciting further that the bank was the highest bidder at the sale (Rec. 224-225). This report was absolutely false (See opinion of Supreme Court of Illinois, Rec. 376, 377).

No action was taken to secure approval of the report of sale for nearly five years. The disposition thereof is hereinafter referred to. On the same day the Master in Chancery executed a Certificate of Purchase to the bank containing the same recitals (Rec. 226-227).

No further notice of any kind or character was given to petitioner, H. Glen Wood, or to his attorney, Hassel B. Smith, with respect to any proceedings or orders in the case subsequent to the public notice of the time, place and conditions of the foreclosure sale held on September 5, 1936.

On December 9, 1937, the Master in Chancery executed and delivered to First National Bank of Woodlawn a Master's Deed purporting to convey the property (Rec. 228, 229), and on the same day filed a Report of Conveyance (Rec. 312). The filing of this report was noted on

January 10, 1938, by the Circuit Court of Jefferson County *ex parte* without prior notice to petitioner, H. Glen Wood, or his counsel (Rec. 314). By the rule of court above referred to, notice of the application for this order of court was required (Rec. 339).

On March 3, 1938, the bank executed an oil and gas lease describing the land in question to respondent Kingwood Oil Company (Rec. 235-241).

On June 10, 1941, the Circuit Court of Jefferson County entered an *ex parte* order purporting to approve the Report of Sale of the Master in Chancery which had been on file since October 1, 1936, without notice to the petitioner, H. Glen Wood, or to his counsel as required by the rule of court and without the knowledge of any of the petitioners (Rec. 230-231).

Subsequent to the entry of this order the respondent bank obtained a second deed to the property and through mesne assignments from the respondent Kingwood Oil Company, Walter Duncan, James Breuil, R. J. Fryer and R. F. Ratcliffe and Alfred J. Williams obtained assignments under which they claimed an interest in the oil and gas lease, and First National Bank of Woodlawn executed a mineral deed purporting to convey a one-half interest in the oil, gas and other minerals underlying the land in question, subject to the oil and gas lease, to respondent, E. A. Obering, who conveyed an interest therein to respondent, Walter Duncan (Rec. 242-291 and for Chronology thereof see Rec. 360).

On September 2, 1941, less than ninety days after the entry of the *ex parte* order purporting to approve the Master's Report of Sale of June 10, 1941, the redemption money was tendered and when the tender was refused the present suit was filed in the same court and the redemption money was deposited with the Clerk thereof on September 5, 1941 (Rec. 13, 33, 56).

The complaint in the instant suit alleged the foregoing facts and further alleged that the Master's Report of Sale and Certificate of Sale were false and untrue; that no sale of the land to respondent bank was ever made or consummated (Rec. 6), and that the purported Master's Deed executed by the Master in Chancery to First National Bank of Woodlawn on September 9, 1936 was absolutely void (Rec. 7) and that the conveyances and assignments previously mentioned are void and constitute clouds on the title to the land in question (Rec. 7-12). The complaint further alleged that the purported order approving the Master's Report of Sale which was entered on June 10, 1941 was entered without notice of any kind to petitioners and without affording petitioners any opportunity to be heard (Rec. 10), and that at the time said order was entered the Circuit Court of Jefferson County had no power to approve a sale which was never made (Rec. 11). The complaint further alleged that certain of the defendants had entered upon the real estate without right or authority or notice to plaintiffs and had caused to be drilled thereon certain test wells which were producing oil and gas in commercial quantities, which oil and gas was being marketed to an unknown purchaser (Rec. 13). The complaint prayed for an adjudication that the real estate in question was never sold pursuant to the decree or, in the alternative, that said alleged sale was void or, in the further alternative, that said alleged sale was not consummated until June 10, 1941, and that the plaintiffs had the right to redeem from said alleged sale (Rec. 15). The complaint further prayed for an adjudication that the Master's Deeds to First National Bank of Woodlawn and the conveyances and assignments executed by the bank to certain of the respondents and between certain of the respondents are null and void, or, in the alternative, subject to the rights of redemption of plaintiffs and subject to the

rights of plaintiffs in and to said real estate (Rec. 16). The respondent, First National Bank of Woodlawn, and the other respondents interposed motions to dismiss the complaint (Rec. 18-27), which were denied. The respondents then filed answers (Rec. 27-98) admitting certain allegations of the complaint, denying others, setting up several defenses including limitations, estoppel by acquiescence, waiver and laches and renewing their motion to dismiss. The answers of the respondents other than First National Bank of Woodlawn alleged further that they were purchasers for value without notice and that their interest in the land was free and clear of any claims by petitioners. Replies were filed to these answers (Rec. 99-120).

After a hearing the Circuit Court of Jefferson County denied petitioners the relief sought and dismissed the complaint (Rec. 121-126). An appeal was taken to the Supreme Court of Illinois where, at the March Term 1941, the judgment of the trial court was affirmed (Rec. 324-337). Petitioners filed an application for rehearing to the June, 1943 Term of the Supreme Court of Illinois (Rec. 342-352), which was granted (Rec. 369-370), and upon reconsideration of the cause the Supreme Court of Illinois again affirmed the judgment below on September 21, 1943 (Rec. 371-381) and thereafter denied petitioners' motion for stay of mandate pending disposition of this petition for certiorari (Rec. 381-382), which is the next proceeding in the case.

II.

Jurisdictional Statement.

The jurisdiction of this court is based upon 237b of the Judicial Code as amended (28 U. S. C. A. 344b). The Supreme Court of Illinois, on September 21, 1943, affirmed the judgment of the Circuit Court of Jefferson County in

favor of the respondents herein and against the petitioners, 383 Ill. 515. The second opinion was filed after the allowance of a petition for rehearing, but since the second opinion directed the entry of the same judgment as the first opinion another petition for rehearing could not be filed. (*Barrett* v. *Shanks*, 382 Ill. 434, 443-444.) This petition is filed in this court within three months of the entry of judgment in the Supreme Court of Illinois.

At the outset in the complaint filed in the Circuit Court petitioners set up their Federal claims. It is alleged that petitioners had no notice of the filing of the false report of sale or of the contents thereof or of the execution and delivery of a certificate of purchase to respondent bank (Rec. 6), and no notice of or opportunity to be heard with respect to the final judgment entered in the cause on June 10, 1941 approving the false report of sale (Rec. 10). Such is an ample presentation of the Federal claim for adjudication (*Bridge Proprietors* v. *Hoboken Land and Improvement Company*, 1 Wall. 116, 143, 17 L. Ed. 571, 575; *St. Louis Iron Mountain & Southern Railway Company* v. *Starbird*, 243 U. S. 592, 598, 37 St. Ct. 462, 61 L. Ed. 917, 922).

The orders entered without notice deprived petitioners of an opportunity to appear and to be heard and to defend and expose the falsity of the master's report of the alleged sale approved by said orders, and the refusal of the Supreme Court of Illinois to adjudge that the orders are void likewise deprives petitioners of an opportunity to be heard and to defend their property rights and violates petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States *Hovey* v. *Elliott*, 167 U. S. 407, 417, 42 L. Ed. 215, 221; *Norris* v. *Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074, 1077, 55 S. Ct. 579; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259; *Windsor* v. *McVeigh*,

93 U. S. 274, 282, 23 L. Ed. 914, 917; *Scott* v. *McNeal*, 154 U. S. 34, 50, 38 L. Ed. 896, 903; *Brinckerhoff Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114; *Coe* v. *Armour Fertilizer Works Co.*, 237 U. S. 412, 423, 59 L. Ed. 1027, 1031.

The affirmance of the decree of the trial court in its wrongful refusal to adjudge that the orders are void is in effect a holding that the orders are *res adjudicata* with respect to the issues raised in the instant suit and deprived petitioners of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (*Hansberry* v. *Lee*, 311 U. S. 32, 85 L. Ed. 22, *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917.)

The affirmance of the decree of the trial court necessarily deprived the petitioners of their rights and property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States because their property was taken without affording to them any opportunity to expose the fraud of the master. (*Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 12, 17, 51 L. Ed. 345-348.)

The action of the Master in Chancery below in the filing of a false report with respect to the sale held September 5, 1936, and the failure to give notice thereof resulted in the creation of a matter in issue in said master's report not to have been anticipated by petitioners and to that extent constituted a violation of the petitioners' rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. (*Reynolds* v. *Stockton*, 140 U. S. 254 at 271, 35 L. Ed. 464 at 469.)

Under the law of Illinois in mortgage foreclosure proceedings there is no sale under a foreclosure decree unless

and until the public auction is held and a report thereof is filed and the report is approved and confirmed by the court (opinion of Supreme Court Rec. 376; *Straus* v. *Anderson,* 366 Ill. 426, 432; *Levy* v. *Broadway-Carmen Bldg. Corp.,* 366 Ill. 279, 286; *Ryerson* v. *Apland,* 378 Ill. 472, 474). The Master in Chancery in his report of sale specified that the sale was subject to the approval of the court (Rec. 307). Accordingly it is the order relied upon as approving the report of sale which is effective to deprive the petitioners of their property. It is not pretended that petitioners had notice of any order entered subsequent to the public auction and it is submitted that petitioners had no opportunity to be heard with respect to the orders of court which took their property from them. Notwithstanding this the Supreme Court of Illinois declined to hold the imaginary sale reported by the master and the orders relied on as approving such fabricated sale void, and declined to rule on the assertions here made, thereby also refusing and declining to protect the rights, titles, privileges and immunities claimed by petitioners under the Fourteenth Amendment of the Constitution of the United States which were necessarily drawn in question (*Chicago, Burlington & Quincy Railroad Company* v. *City of Chicago,* 226 U. S. 226, 233, 41, L. Ed. 979, 983-984; *Roby* v. *Colehour,* 146 U. S. 153, 37 L. Ed. 922, 924).

The petitioners raised the federal claims sought to be reviewed by alleging in their complaint that no notice with respect to the purported master's report of sale and master's certificate of purchase and deed were given to or received by them (Rec. 6, 10), and petitioners urged in their brief and argument to the Supreme Court of Illinois that the court below erred in refusing to decree that the master's report of sale and the certificate of purchase and deed executed by the Master in Chancery were a nullity and void and urging that the trial court was without power

to approve the alleged sale reported in said master's report of sale and urging that the purported sale so reported was a nullity, and the Supreme Court of Illinois in its decision rendered at the March Term 1943, agreed that the proceedings in question were erroneous, but refused to declare the proceedings void (Rec. 331-333).

The petitioners then filed their application for rehearing urging that the action of the court below disclosed a flagrant violation of their rights to their day in court and that the action of the Master in Chancery and counsel for respondent, First National Bank of Woodlawn, Illinois, had deprived the Circuit Court of Jefferson County of the ability to protect the rights of litigants in connection with the false report of sale (Rec. 351, 352), but the Supreme Court of Illinois, in its decision and opinion in connection therewith of September 21, 1943, has declined to make any ruling on the validity of said order and instead adopts non-federal grounds (Rec. 373-379) without substantial support in fact or in law as the basis for affirmation of the judgment below, thus expressly failing and refusing to protect the rights and property of the petitioners from violation of the 14th Amendment to the Federal Constitution with respect thereto (*Ward* v. *Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758).

The affirmance by the Supreme Court of Illinois of the decree of the trial court, which had ruled adversely on the federal constitutional questions presented by the petitioners, necessarily involved substantial federal questions, the disposition of which were necessary to a proper determination of the case.

III.

Questions Presented.

1. Where a Master in Chancery at a public sale held pursuant to public notice pursuant to the terms of the foreclosure decree strikes the property off to the highest bidder at such sale and thereafter, because such highest bidder fails to make good his bid within the time specified by the Master, may the Master, consistently with the Fifth and Fourteenth Amendments of the Constitution, in his own discretion and without notice to any one, report a sale which was never made and issue a certificate of purchase of such fabricated sale and in due course and also without notice, issue a deed conveying the mortgaged premises to the purchaser at the imaginary sale?

2. Where the rules of court require that notice of all motions shall be given to opposing counsel, and counsel for one party obtains the entry of an order disposing of property rights without giving any notice to the other party who is represented by counsel, is the order entered on the motion valid or void and of no effect?

3. Are the order so entered without notice, as aforesaid, and the master's sale approved by said purported order subject to collateral attack in an independent suit?

4. Whether the action of the trial court and the affirmance of the Supreme Court in refusing to adjudicate that the purported order approving the master's report of sale which was entered without notice are so plainly arbitrary, unreasonable and contrary to law as to amount to a spoliation of the petitioners and deprivation of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution?

5. Whether the judgment of the trial court and its

affirmance by the Illinois Supreme Court without any evidence whatever as to notice to support the purported order approving the master's report of sale are so plainly arbitrary and contrary to law as to amount to a spoliation of the petitioners and a capricious and arbitrary judicial seizure of their property and a denial of their rights without due process of law in violation of the 14th Amendment to the Federal Constitution?

6. Whether the decision and opinion in connection therewith of the Supreme Court of Illinois in failing and refusing to rule on the issue squarely presented by the pleadings and the evidence to-wit: the validity or invalidity of the purported order approving the master's report of the alleged sale, and instead basing its decision upon a non-substantial and illfounded non-federal question, which ground is itself at variance with previous holdings by the Supreme Court of Illinois, as well as by the Supreme Court of the United States, is so plainly arbitrary, contrary to law and capricious as to amount to a mere spoliation of the petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the Federal Constitution?

7. Whether the judgment and opinion in connection therewith of the Illinois Supreme Court that plaintiff has another remedy when, as a matter of fact and law, plaintiff has no other remedy, which fact is recognized by the opinion, whereas petitioners' action was the proper remedy as supported by a long line of decisions in the courts of Illinois and in the Supreme Court of the United States, is so arbitrary, contrary to law and capricious as to amount to a spoliation of the petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the Federal Constitution?

8. Can there be innocent third party purchasers for

value without notice when the record of the foreclosure proceedings fails to disclose notice preceding confirmation of the sale and confirmation is delayed for nearly five years after the alleged sale in question?

IV.

Reasons Relied on for the Allowance of the Writ of Certiorari.

1. The decision of the Supreme Court of Illinois in affirming the decree of the court below is not in accord with the following applicable decisions of this court: *Stuart* v. *Gay*, 127 U. S. 518, 527, 32 L. Ed. 191, 194; *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914, 917; *Pacific Railroad of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505, 519, 28 L. Ed. 498, 504; *Pacific Railroad Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932, 935.

2. The decision of the Supreme Court of Illinois in holding that the instant suit could not be maintained because it amounts to a bill of review, which is not sustainable under the circumstances, is not in accord with the decision of this court in *Pacific Railway of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505, 519, 28 L. Ed. 498, 504, in which this court held that in an independent action inquiry could be made into allegations of fraud in connection with an order confirming a foreclosure sale under circumstances where the complaining parties were bound by the consent of an attorney in connection with such approval, and this court overruled a demurrer to a complaint setting forth these facts. The decision of the Supreme Court of Illinois in holding that the purported sale in question here would have been vulnerable to attack in a direct proceeding is not in accord with the decision of this court in *Pacific Railroad Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L.

Ed. 932, 935, which holds that on appeal this court must take the case as it comes in the record and receive no new evidence. Since the term of court at which the purported order approving the master's report of sale was entered had expired, there was no way within which petitioners could have made a record showing the invalidity of the proceedings in question except by way of collateral attack thereon.

3. The decision of the Supreme Court of Illinois in failing and refusing to hold that the purported order approving the master's report of sale which was entered on June 10, 1941 without notice was in fact void is not in accord with the decision of this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 917, to the effect that a final order which is entered without affording the adverse party an opportunity to appear and be heard in connection with the entry of such an order is a violation of constitutional rights, null and void and subject to collateral attack. In that case on an *ex parte* motion the court entered an order striking the defendant's answer from the files entering judgment in favor of plaintiff while the defendant was prevented from coming into the jurisdiction of the court trying the cause.

4. The decision of the Supreme Court of Illinois in failing and refusing to hold that an order entered without notice in violation of a rule of court requiring notice to be served upon the attorney of record for opposing parties constitutes such order a void order, is also not in accord with the decision of this court in *Windsor* v. *McVeigh*, *supra*.

5. The decision of the Supreme Court of Illinois in holding that the Master in Chancery, under the facts existing in the present case, may ignore the highest bidder at the foreclosure sale and instead of applying for instructions to the court with respect to the bidder's default summarily sell the property to a lower bidder without further

notice is not in accord with the decision of this court in *Stuart* v. *Gay*, 127 U. S. 518, 522, 32 L. Ed. 191 at 194, in which this court cited Daniells Chancery Practice 1282, Chap. 29, Sec. 1, and *Campbell* v. *Gardner*, 11 New Jersey Equity, 424, with approval, to the effect that the proper practice is for the plaintiff to obtain an order for resale and upon the purchaser to pay the expenses and any deficiencies in price arising upon the second sale. The decided cases in Illinois are to the same effect (*Hill* v. *Hill*, 58 Ill. 239, 242). The court also might summarily require the successful bidder to pay the amount of his bid enforcing such order by process for contempt if necessary (*Wakefield* v. *Wakefield*, 256 Ill. 296, 301).

A certified copy of the record in said suit in the Supreme Court of Illinois, including the abstract of record, proceedings, opinion and disposition of the cause had in said court, is herewith furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of the Rules of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of Illinois commanding that court to certify and send to this court for its review and determination a full and complete transcript of the record and all the proceedings had in case numbered and entitled to its docket as No. 26870, "George F. Wood, *et al.*, Appellants *vs.* First National Bank of Woodlawn, *et al.*, Appellees" and that said opinion and judgment of the Supreme Court of Illinois may be reversed by this court with directions that this cause be remanded to the Circuit Court of Jefferson County, Illinois, for the entry of a decree granting the relief prayed by petitioners in their complaint in that court and that petitioners may have

such other and further relief in the premises as to this Court may seem just.

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
Attorneys for Petitioners.

Attorney of Record.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Opinion of Court Below.

The opinion of the Supreme Court of Illinois is reported in 383 Ill. 515, of the Illinois Reports and is included in the record filed in this cause (Rec. 371).

Jurisdiction.

1. The jurisdiction of this court is based upon Judicial Code, Section 237b as amended by the Act of February 13, 1925. Federal Code Annotated, Title 28, Section 344b.

2. The date of the judgment to be reversed is September 21, 1943 (Rec. 371).

3. The Fifth and Fourteenth Amendments to the Constitution of the United States were drawn in question by the petitioners who specially set up and claimed rights, privileges and immunities thereunder which were denied by the courts below in their rulings.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari which also contains a full statement of the questions presented and, in the interest of brevity, are not repeated here. Any necessary elaborations on the evidence on the points involved will be made in the course of argument which follows.

Specification of Errors.

The Supreme Court of Illinois erred:

(1) In affirming the judgment of the Circuit Court of Cook County which dismissed the complaint of petitioners in that court;

(2) In refusing to grant to petitioners the relief prayed for in petitioners' complaint in the court below;

(3) In refusing to decree that petitioners are entitled to redeem under the statute;

(4) In refusing to decree that appellants are entitled to redeem in equity;

(5) In refusing to decree that the Master's report of sale and the certificate of purchase and deed executed by the Master in Chancery were a nullity, void and a cloud upon the title of petitioners;

(6) In refusing to decree that the order entered on June 10, 1941, approving the Master's report of sale was void for lack of notice prior to the entry thereof and subject to collateral attack;

(7) In refusing to decree that the oil and gas leases and deeds executed by respondents are void and clouds upon the title of petitioners.

SUMMARY OF ARGUMENT.

I.

This Court Has Jurisdiction to Review This Cause Because a Federal Question Was Involved in the Decision of the State Court.

Windsor v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917.

Reynolds v. *Stockton*, 140 U. S. 254, 265, 35 L. Ed. 464, 468.

Smith v. *Woolfolk*, 115 U. S. 143, 149, 29 L. Ed. 357, 360.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 59 L. Ed. 1027, 1032.

Ward v. *Love County*, 235 U. S. 17, 22, 64 L. Ed. 751, 759.

Terre Haute and Indiana Railway Company v. *Indiana ex rel Ketchum*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129.

Truax v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

Kansas Southern Railway Company v. *C. H. Albers Commission Co.*, 223 U. S. 573, 593, 56 L. Ed. 556-566.

Creswill v. *Grand Lodge K. P.*, 225 U. S. 246, 261, 56 L. Ed. 1074, 1081.

II.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was a Void Sale.

Williamson v. *Ball*, 8 Howard (U. S.) 566, 12 L. Ed. 1201.

Williamson v. *Berry*, 8 Howard (U. S.) 495, 528, 548, 12 L. Ed. 1170, 1185-1193.

Shriver's Lessee v. *Lynn*, 2 Howard (U. S.) 43, 11 L. Ed. 172.
Welch v. *Louis*, 31 Ill. 446, 457.
Quick v. *Collins*, 197 Ill. 391, 394, 64 N. E. 288.
Armstrong v. *Obucino*, 300 Ill. 140, 143, 133 N. E. 58.
Hall v. *American Bankers Ins. Co.*, 315 Ill. 252, 256, 146 N. E. 137.
Reynolds v. *Wilson*, 15 Ill. 395, 396.

III.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was Contrary to the Terms of the Decree of Sale Entered in the Foreclosure Proceedings.

Williamson v. *Ball*, *supra*.
Shriver's Lessee v. *Lynn*, *supra*.
Freeman on Void Judicial Sales, Section 21.
Quick v. *Collins*, *supra*.
Reynolds v. *Wilson*, *supra*.

IV.

Other Respondents Have Not Acquired Any Rights in the Subject Matter Which Entitles Them to the Status of Bona Fide Purchaser.

Logue v. *Von Alman*, 379 Ill. 208, 223.
Thayer v. *Village of Downer's Grove*, 369 Ill. 334, 339.
Whitaker v. *Miller*, 83 Ill. 381, 385.
Forcum v. *Brown*, 251 Ill. 301, 314.
Williamson v. *Ball*, *supra*.

V.

Petitioners Were Not Guilty of Laches.

Sutherland v. *Reeve*, 151 Ill. 384.
Roby v. *Colehour*, 146 U. S. 153, 37 L. Ed. 922, 924.
Coolidge v. *Rhodes*, 199 Ill. 24.

ARGUMENT.

I.

This Court Has Jurisdiction to Review This Cause Because a Federal Question Was Involved in the Decision of the State Court.

A long line of decisions of this court has firmly established the following propositions with respect to the requirements of the 5th and 14th Amendments to the Constitution of the United States.

1. They extend to the judicial branches of the governments of the several states as well as to the executive and administrative branches thereof.

2. The judicial branches of the several states shall accord to persons, against whom the judicial power is invoked, notice and an opportunity to appear in and defend against any action affecting their life, liberty and property and, conversely, that judgments entered against persons without notice and an opportunity to appear and defend are mere acts of judicial usurpation *coram non judice* and null and void.

3. Void judgments are subject to attack in any action in which they are called into question whether such attack be direct or collateral.

Opportunity to be heard within the concept of due process contemplates that parties to a judicial proceeding shall have a reasonable opportunity to make and obtain a hearing upon their claim or defense before a final judgment shall be entered; thus in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914-917, the striking of an answer previously filed by the defendant's attorney and the entry

of an *ex parte* judgment were held to be a violation of due process where the defendant was at the time within the confederate lines and unable to make further defense. Thus also in *Reynolds* v. *Stockton*, 140 U. S. 254, 265, 35 L. Ed. 464, 468, the obtaining of a personal judgment against a defendant who had filed an answer to a suit through an attorney was held to be a violation of due process, even though the motion for judgment was served upon his former attorney, because the personal liability phase of the suit had long lain dormant while the suit proceeded along other lines, thus inducing defendant to believe that the personal liability phase of the action had been abandoned, wherefore he failed to make further defense with respect thereto. Thus also in *Smith* v. *Woolfolk*, 115 U. S. 143, 149, 29 L. Ed. 357, 360, this court refused to accord recognition to a judgment based upon a claim instituted by a defendant against cross defendants pursuant to notice by letter after the main issues of the suit had been terminated because this court regarded the new claim as the institution of a new suit which required the service of process and the court pointed out that the Statutes of Arkansas did not provide for substituted service and that this court would not recognize the judgment if the Statutes did so provide. Thus, also in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 423, 59 L. Ed. 1027, 1032, where an execution had been returned unsatisfied as against the corporate defendant and was then served upon a stockholder on the ground that he was indebted to the corporation for an unpaid stock subscription pursuant to the terms of a Florida Statute, this court held that the statute in affording to stockholders the right to appear and show why such execution should not be enforced against them did not satisfy the requirement that the state must require notice and afford the right and opportunity to a hearing before a judicial liability may be asserted against a person.

Where a federal question has been raised in a proper manner, it is within the province of this court to analyze the evidence bearing on the federal question and the decision of the state court in order to determine whether a federal right was actually denied in the state court, and this irrespective of the fact that the state court based its decision upon a non federal question if the non-federal question was unsubstantial or was wrongly construed to avoid the making of a decision denying a federal right. Thus, in *Ward* v. *Love County*, 235 U. S. 722, 64 L. Ed. 751, 759, where a right to exemption was claimed, this court held that the claimant of such objection was entitled to the judgment of this court as to whether said claim to exemption was denied or was not given due consideration, and this irrespective of whether the right was denied in express terms or denied in substance and effect as by putting forward non-federal grounds of decision that were without any fair or substantial support. Thus, also in *Terre Haute and Indiana Railway Company* v. *Indiana ex rel. Ketchum*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129, this court held that the state court sustained its decision on a wrong construction of a charter without relying upon the authority of unconstitutional legislation and noted that this method of disposing of the case by the state court would if allowed provide an easy method of defeating the jurisdiction of this court and then construed the constitutionality of the legislation in question. Thus also in *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259, this court held that where the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding of the state court to determine whether it is without substantial support, for if the rule were otherwise it would almost always be within

the power of the state court to prevent a review by this court. To substantially the same effect is *Kansas City Southern Railway Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 593, 56 L. Ed. 556, 566, which is cited in *Truax* v. *Corrigan, supra.* Likewise in *Creswill* v. *Grand Lodge, Knights of Pythias,* 225 U. S. 246, 261, 56 L. Ed. 1074, 1081, this court held that it had the power to examine the evidence where there was a claim of denial of a federal right accompanied by a contention that there was no evidence to support a finding of fact with respect thereto and where conclusions of fact and findings of law with respect to the federal question are intermingled.

In the foreclosure proceedings which are in question here petitioner, H. Glen Wood, after being served with process in the foreclosure proceedings, filed an answer to the complaint through his attorney (Rec. 211-13). Under the rules of the Circuit Court of Jefferson County then in full force and effect, his attorney thereupon became entitled to receive previous written notice with respect to the entry of any subsequent order (Rec. 211-213, 363; Rule 7). The report of the Master in Chancery with respect to the purported sale of September 5, 1936, which was filed in the Circuit Court of Jefferson County on October 1, 1936, was false and its purported *ex parte* approval nearly five years later not only took from H. Glen Wood his status of successful bidder and party entitled to a certificate of purchase upon payment of the bid price, but also deprived him and the remaining petitioners herein of their statutory right of redemption. The order in question was a final and appealable order and its effect unless judicially condemned is to deprive petitioners of their interest in the property in question. It is submitted that said order was subject to the protection of the due process requirements of the 5th and 14th Amendments to the Constitution of the United States, and the failure to serve

H. Glen Wood's attorney with notice of the motion for approval of said false master's report, which failure was itself in violation of an express rule of court, or the failure otherwise to afford H. Glen Wood with a reasonable opportunity to appear and defend with respect thereto was a denial to him of due process of law such as to make the *ex parte* order of June 10, 1941 a mere act of judicial usurpation *coram non judice*, null and void and subject to attack whenever called in question.

In *Pacific Railway of Missouri* v. *Missouri Pacific Railway Company*, 111 U. S. 505 at 519, 28 L. Ed. 498 at 504, which was an independent bill to impeach a foreclosure sale and confirmation thereof on the ground that the mortgagor and the plaintiff had been guilty of fraud prior to the sale and confirmation, and pursuant to the plan of fraud, the attorney for the mortgagor consented to the entry of the order confirming the sale this court overruled a demurrer to the bill and remanded the cause for further proceedings.

The federal question was necessarily involved in the instant suit from its inception. The complaint alleged the failure of notice with respect to the order in question. The trial court, in its judgment dismissing the action of petitioners, necessarily denied the federal right in question. The Illinois Supreme Court, in its original decision and opinion in connection therewith on the federal question, based its ruling upon the ground that the sale proceedings in question were not void, but merely voidable, and were not subject to collateral attack, thus in effect denying the federal right. On rehearing the state court ignored the federal question, choosing to place its decision upon the grounds that: (1) the instant suit is a bill of review, which it is not, but that it does not meet the recognized requirements of a bill of review, and (2) that it is a bill to redeem, which it is in part, but that the false report of the master

does not constitute such fraud as to entitle petitioners to redeem. Thus the state court has based a decision upon an unsubstantial non-federal issue, avoiding the making of a decision denying a federal right, but the denial of the federal right is necessarily involved. The facts with respect to the federal question in the instant case therefore fall squarely within the doctrine of *Ward* v. *Love, supra, Terre Haute and Indiana Railway Company* v. *Indiana ex rel. Ketchum, supra; Truax* v. *Corrigan, supra; Creswill* v. *Grand Lodge, Knights of Pythias, supra* and *Kansas City Southern Railway Co.* v. *C. H. Albers Commission Co., supra.*

It is therefore within the province of this court to analyze the evidence in the State Court on the federal question and the decision of the State Court in order to determine whether a federal right was actually denied.

The evidence with respect to the purported sale of September 5, 1936, the *ex parte* order of December 9, 1937, approving the master's report of conveyance and the *ex parte* order approving the false master's report of sale, taken in conjunction with the appearance and answer of H. Glen Wood through his attorney and the rule of the Circuit Court of Jefferson County requiring prior written notice to attorneys of record of subsequent orders and the false master's report itself, are all of the evidence in the record bearing upon the question of due process. There remains for analysis by this court the basis of the decision of the State Court.

The Bill of Review Theory.

The substance of the final opinion of the Supreme Court of Illinois is that the complaint is a bill of review, that a bill of review cannot be maintained because the facts in this case do not fit into one of the situations which the

peculiar chancery bills known as bills of review were employed to correct. The opinion proceeds from the basic premise that because the wrongs to be corrected by bills of review were limited, petitioners are not able to have their day in court to expose the fraud of the Master. The approach is precisely the same as the enforced reasoning of the early English courts under the formulary system of practice when a plaintiff was unsuccessful unless the wrong he sought to redress fell within a specified pattern of a limited number of available writs. Stripped of its sophistry the decision of the State Court is, in effect, a denial of constitutional rights because of an alleged failure of any remedy therefor. This pretext will not defeat the claim of violation of a constitutional right. *Brinckerhoff Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107.

For more than a decade there have been no such things as bills of review in the courts of Illinois. Section 31 of the Civil Practice Act, in force January 1, 1934, abolished the distinction between all actions and all pleadings in actions at law and suits in equity and required that all actions be commenced by a pleading designated "Complaint," (Illinois Revised Statutes State Bar Association Edition chapter 110, section 155). Thus the sole question in any case in Illinois under the Civil Practice Act is whether under the facts set forth in the complaint, judicial relief is justified.

The first pleading filed by petitioners in this suit in the Trial Court was entitled "Complaint." It was not entitled "Bill of Review". Thus the decision of the State Court is an outmoded refinement of chancery pleading which was abolished a decade before the instant suit was filed. This ground may not be interposed to defeat the substantial rights of litigants and to deprive them of their day in court and opportunity to be heard.

The method employed by petitioners to assert their rights, *i. e.*, an original action, was the only remedy available. If petitioners had been advised of the entry of the order of June 10, 1941 or any other order entered subsequent to the public auction on September 5, 1936 and had taken an appeal therefrom, they would have been bound by the record of the case in which the fraud of the Master did not appear. *Pacific Railway Company of Missouri* v. *Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932, 935. Furthermore any attempt to vacate the order or orders in question in the court below in order to make up a record from which the fraud of the Master would appear was required to be made within thirty days from the date of the orders in question, after which the Trial Court lost jurisdiction over them (Illinois Revised Statutes State Bar Association Editor, chapter 77, section 84). The only other method of direct review of a judgment afforded by the Illinois courts is section 72 of the Civil Practice Act (Illinois Revised Statutes State Bar Association Edition, chapter 110, section 196). It was not possible for petitioners to proceed under this section for the reason that about one week before the entry of the order of June 10, 1941, the Supreme Court of Illinois had held this section applicable only to actions at law and not applicable to proceedings in chancery. *Frank* v. *Salomon*, 376 Ill. 439, 445, April 10, 1941, rehearing denied June 4, 1941, and see *Pedersen* v. *Logan Square State Bank*, 377 Ill. 408, 412, to the same effect. The situation then existing was analogous to the judicial question posed to the attorneys in *Brinckerhoff Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 74 L. ed. 1107.

The Bill to Redeem Theory.

The alternative title which the Supreme Court of Illinois arbitrarily applies to the complaint of petitioners is that of a bill to redeem (Rec. 373). The prayer for relief did seek to have the right of redemption established.

Under the Illinois Statute all land sold in a mortgage foreclosure is subject to redemption by the mortgagor for a period of twelve months (Ill. Rev. Stats., Chap. 77, Par. 18). The period commences to run "from said sale." In the Supreme Court of Illinois it was urged in argument that since no date could be given for the sale to the respondent bank the redemption period had either not commenced to run or petitioners had wrongfully been deprived of their right to redeem. As we have noted, under the Illinois decisions there is no sale until the sale is approved by the court. Within ninety days thereafter petitioners tendered the redemption money. The disposition the Supreme Court made of this contention is striking.

Since the court was unable to point to any day when there had been a sale of the property to the respondent bank it became necessary to adopt some subterfuge to defeat the right to redeem. The subterfuge adopted is the statement that the period commenced on January 10, 1938, at which time the court noted the filing of the master's report of conveyance. This is a novel doctrine without support in the Statutes and decisions in Illinois.

It is submitted that the state court sustained its decision through the medium of two misconstructions upon non-federal questions thus avoiding the ruling upon the federal question involved and for this reason this court has jurisdiction to review the proceeding in the state court in order to determine whether a federal question was in fact involved and denied.

Summary Disposition of the Fraud of the Master.

The opinion of the Supreme Court of Illinois sets forth that petitioners asserted that the fraud of the Master vitiated the sale (Rec. 375, 378). In fact petitioners' contention was that there had never been a sale pursuant to the foreclosure decree and the Master could not manufacture a sale. The opinion disposes of this contention by stating that the fraud of the Master does not invalidate the decree but like perjury is a fraud on the court which does not render the decree void.

It has long been the settled law that judgments or decrees obtained through artifices designed and operating to prevent the parties against whom they are rendered from receiving knowledge of the pendency of the action or steps taken therein will be set aside on the ground of fraud. Thus in *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, the court pointed out that where a party has been prevented from fully exhibiting his case by the fraud or deception practiced on him or where a party has no knowledge of proceedings being taken against him equity will relieve against the fraud and annul the former judgment or decree so as to give the defeated party his opportunity to be heard. To the same effect are all decisions in which the question has arisen. *Haddock* v. *Haddock*, 201 U. S. 562, 627; *U. S.* v. *Beebe*, 180 U. S. 343, 349, 45 L. ed. 563, 568; *T. G. Moss Tie Co.* v. *Wabash Railway Company*, C. C. A. 7th—Ill., 71 F. (2d) 107, 109; *Ferguson* v. *Wachs*, C. C. A. 7th—Ill., 98 F. (2d) 910, 918, and see the collection of cases 88 A. L. R. 1201. In the case of *Ferguson* v. *Wachs*, the Circuit Court of Appeals for the Seventh Circuit in an Illinois case in which an officer of the court failed to make a disclosure incumbent upon him said (loc. p. cit. 918):

> "The failure to perform the duty to speak or make disclosure which rests upon one because of a

trust or confidential relation is obviously a frau
for which equity may afford relief from a judgme
thereby obtained, even though the breach of du
occurs during a judicial proceeding and involv
false testimony and this is true whether such frau
be regarded as extrinsic fraud or an exception to t
extrinsic fraud rule."

II.

The Sale of the Mortgaged Premises to the First Nation Bank of Woodlawn Was a Void Sale.

It appears from the record and the opinion of the Sta
court that on September 5, 1936, the Master in Chancer
at a public sale held pursuant to the terms of a decree
foreclosure, struck off and sold mortgaged premises
H. Glen Wood (Rec. 132, 134, 136, 138, 145, 371, 372), th
Wood did not make payment, and that on September 2
1936, a letter was written by the Master to Wood, statin
that Wood had bought the property and demanding t
amount bid (Rec. 222). Thereafter on October 1, 193
the Master, without another advertisement and witho
conducting any other sale, filed a report of sale recitin
that the mortgaged property had been sold to the Fir
National Bank of Woodlawn, and that the bank was t
highest bidder at the sale (Rec. 224). On the same da
the Master issued a certificate of purchase containing t
same recitals (Rec. 226).

The conclusion is inescapable that the sale of the mor
gaged premises to the First National Bank of Woodlaw
did not occur on September 5, 1936, nor at any time betwe
September 5, 1936, and September 21, 1936, but that t
sale actually occurred on some date subsequent to Se
tember 21, 1936, and that the Master's report of sale a
certificate of purchase reciting that the sale therein

ported occurred on September 5, 1936, were false. There is no proof in the record and there is no claim that any public notice of a second public sale of the mortgaged premises to be held on any date subsequent to September 4, 1936, was given. At the sale held on September 5, 1936, which was the public sale, Wood was the successful bidder. Thus the sale by which the First National Bank of Woodlawn became the purchaser of the mortgaged premises was not a sale pursuant to public notice as required by the decree, but was the private act of the Master in Chancery at a later date, and was, in fact, a private sale.

It is unnecessary to prolong this petition by citing authorities to the effect that a private sale held pursuant to the terms of a decree requiring a public sale is void. *Williamson* v. *Ball*, 8 Howard (U. S.) 566, 12 L. Ed. 1200 at 1201; *Williamson* v. *Berry*, 8 Howard (U. S.) 495, 528-548, 12 L. Ed. 1170, 1185-1193; *Shriver's Lessee* v. *Lynn*, 2 Howard (U. S.) 43, 11 L. Ed. 172; *Welch* v. *Louis*, 31 Ill. 446, 457 (prior to N. E. Reporter Service); *Quick* v. *Collins*, 197 Ill. 391, 394, 64 N. E. 288; *Armstrong* v. *Obucino*, 300 Ill. 140, 143, 133 N. E. 58; *Hall* v. *American Bankers Ins. Co.*, 315 Ill. 252, 256, 146 N. E. 137; *Reynolds* v. *Wilson*, 15 Ill. 395, 396 (prior to N. E. Reporter Service). There are, of course, a number of cases, both federal and state, to the general effect that defects in a public notice with respect to a public sale or minor irregularities in the conduct of the sale will not render such sale void, and in its first opinion at the March, 1943, Term the Illinois Supreme Court relied upon a collection of cases to this effect. It is submitted, however, that there is not a single case anywhere in the accumulated body of the law affirming the validity of a sale by a Master in Chancery under circumstances remotely approaching the facts in this case.

III.

The Sale of the Mortgaged Premises to the First National Bank of Woodlawn Was Contrary to the Terms of the Decree of Sale Entered in the Foreclosure Proceedings.

The decree of sale in the foreclosure proceeding required the Master to "give public notice of the time and place of said sale by previously publishing the same in a secular newspaper in said county and posting notices as the law required" (Rec. 219).

The act in regard to notices (Ill. Rev. Stat., Chap. 100, Sec. 3) provides: "Whenever notice is required by law or order of Court, and the number of publications is not specified, it shall be intended that the same be published for three successive weeks."

It will thus be seen that the Circuit Court of Jefferson County required that any sale of the mortgaged premises be a public sale, and pursuant to publication for three successive weeks. The Circuit Court of Jefferson County had no power to authorize the Master in Chancery to conduct a private sale. The decree constituted the sole authority of the Master in Chancery to make the sale, and unless he followed the authority the sale could not be approved (*Williamson* v. *Ball*, 8 How. (U. S.) 566, 12 L. ed. 1200, 1201; *Shrivers Lessee* v. *Lynn*, 2 How. (U. S.) 43, 11 L. ed 172; Freeman on Void Judicial Sales, Sec. 21; *Quick* v. *Collins*, 197 Ill. 391, 394, 64 N. E. 188; *Reynolds* v. *Wilson*, 15 Ill. 395, 396 (prior to N. E. Reporter System).

The only theory under which it might be contended that the order approving the Master's purported report of sale could have the effect of validating the private sale to First National Bank of Woodlawn is that the Court, by reason of subsequent approval, in effect, modified the provisions of the decree of sale. Since the purported order approv-

ing the Master's report of conveyance was entered more than one year after the decree of foreclosure was entered, it is obvious that this theory is untenable, because the Circuit Court of Jefferson County lost jurisdiction to amend the decree of foreclosure after the expiration of 30 days. Thus, it is seen that the alleged approval of the reported sale is effective only to the extent that it is a modification of the decree for sale and it was beyond the power of the Circuit Court to alter or amend that decree in any respect after the expiration of 30 days. (Ill. Rev. Stat. State Bar Assn. Chap. 77, Sec. 84.) We further respectfully direct the Court's attention to the fact that the Master's report of sale (Rec. 224-225) failed to apprise the Circuit Court of the fact that any person other than First National Bank of Woodlawn had any interest in the subject matter presented to the Court for adjudication. For reasons best known to himself, the Master in Chancery, in his report of sale, failed to report the fact that at the sale held on September 5, 1936, the property had been struck off and sold to Wood. Thus, the Circuit Court of Jefferson County was, in effect, prevented from knowing the petitioner H. Glen Wood claimed any interest in the premises with respect to the sale in question and thereby was misled into assuming that First National Bank of Woodlawn, whose attorney presented the purported order approving the sale, was the only person interested in the subject matter. Through this device the Circuit Court of Jefferson County was not led to inquire into the question of notice to petitioner H. Glen Wood or his counsel in connection with the presentation of said purported order.

IV.

Other Respondents Have Not Acquired Any Rights in the Subject Matter Which Entitles Them to the Status of Bona Fide Purchaser.

The opinion of the Supreme Court at the March Term, 1943, held that the order of June 10, 1941 which purported to approve the false master's report of sale on file since October 1, 1936, was not void but merely voidable, and that by reason thereof respondent parties in interest were entitled to the status of bona fide purchasers for value without notice (Rec. 331). In its opinion of September 21, 1943, the State Court noticeably failed to make a ruling on the question of whether the order in question was void and consequently abandoned its previous declaration that respondent parties in interest acquired the status of bona fide third party purchasers for value without notice.

There can be no question but that First National Bank of Woodlawn, which was a party to the suit and whose attorney presumably participated in the proceedings therein, would not be entitled to the status of a third party purchaser for value without notice. With respect to the remaining respondent parties in interest, it is deemed advisable, notwithstanding that this question is not in issue in the final opinion of the State Court, to point out that such respondent parties in interest are not, in fact, entitled to the status of bona fide purchasers for value without notice.

As has heretofore been seen, the judicial proceedings were not regular, and that fact was apparent upon the face of the record. The chronology of events which clarifies the order was set forth in the petition for rehearing in the State Court and reference is hereby made thereto (Rec. 359).

The record of the foreclosure proceedings contains no proof of service of notices on opposing counsel and no order entered subsequent to the public sale held on September 5th finds that notice was given or that counsel for the opposing party was present in open court at the time of the entry thereof (Rec. 230-231).

The record furnishes ample evidence, furthermore, that the other parties in interest paid no attention to the state of the record, but, instead, relied upon a most superficial examination of the title by the attorneys for Kingwood Oil Company. On March 11, 1938, Kingwood Oil Company received a letter from Messrs. Scholfield and Purdunn, its counsel, advising that in their opinion based upon the incomplete material available for examination, First National Bank of Woodlawn was the owner of the property (Rec. 316-318). It is worthy of note that this opinion was rendered eight days after the execution of the oil and gas lease by First National Bank of Woodlawn and twelve days before the lease was recorded, and more than three years prior to the entry of the purported order approving the Master's report of sale. If, as respondents claim, they became good faith purchasers at that time, why did it become necessary three years later to apply for an order approving the fabricated sale and to obtain a fresh, new Master's deed? And if, as respondents claim, they proceeded under the halo of good faith, why did they not upon applying for an order of court give the notice of such application which the rules of court and the law required? It is submitted that this position of respondents does not withstand the searchlight of scrutiny which this court will apply.

The opinion of the State Court states that the approval of the report of conveyance of the Master cured all irregularities that preceded and which appeared on the face of the record, but this purported order was also entered without

notice to H. Glen Wood or his counsel and this failure of notice was easily ascertainable from an inspection of the record.

Notwithstanding the above discussion of the evidence, it is suggested that the evidence on the question was of no importance because the order in question was void, by reason whereof the Master's deed cannot be made the foundation of a good title until the Master's report of sale has been properly approved. In *Logue* v. *Von Alman*, 379 Ill. 208, 223, there was reaffirmed the rule existing in Illinois from the earliest times to the effect that a void deed passes no title and cannot be made the foundation of a good title, even under the application of the equitable doctrine that protects bona fide purchasers.

In *Thayer* v. *Village of Downer's Grove*, 369 Ill. 334, 339, it was held to be a well established rule that a void judgment or order may be vacated any time and that the doctrines of laches and estoppel do not apply. See also *Whitaker* v. *Miller*, 83 Ill. 381, 385; *Forcum* v. *Brown*, 251 Ill. 301, 314. That this is also the federal rule is amply demonstrated by the ruling of this court in *Ball* v. *Williamson*, 8 Howard (U. S.) 566, 567, 12 L. Ed. 1200, 1201.

V.

Petitioners Were Not Guilty of Laches.

It is respectfully submitted that it is an indispensable element in the application of laches that the party who is sought to be charged therewith must have had knowledge of the facts, and that the doctrine will not be applied where the party, against whom it is sought to charge laches, was, in fact, in ignorance of material facts connected with his rights (*Sutherland* v. *Reeve*, 151 Ill. 384; *Roby* v. *Colehour*, 146 U. S. 153, 37 L. ed. 922, 924; *Coolidge* v. *Rhodes*, 199 Ill. 24).

The record copy fails to disclose any evidence to indicate that H. Glen Wood knew that the Master in Chancery had filed a false report of sale, and that the Court had entered an order approving a subsequent sale to another person, and respondents nowhere make the contention that there was any such knowledge.

Conclusion.

It is respectfully submitted that the facts in this case disclose as flagrant a violation of the rights of parties litigant as to their right to a day in court as can be imagined. It would have been bad enough if a master's report of sale, reciting that the property had been sold to H. Glen Wood, had been set aside by the Circuit Court of Jefferson County without notice to H. Glen Wood; it would have been worse if a master's report of sale, reciting the bid by H. Glen Wood at the public sale and the subsequent private sale at a later date to the First National Bank of Woodlawn had been approved by the Court without notice, as in this case, the Circuit Court of Jefferson County would have been chargeable with a callous disregard for the rights of H. Glen Wood, but the actual facts make out a case much worse, for the procedure followed by the Master deprived the Circuit Court of Jefferson County of the ability to protect the rights of anyone and in this procedure, First National Bank of Woodlawn is equally culpable since it was the failure of the Bank's counsel to give notice to H. Glen Wood which misled the Circuit Court into believing that it had jurisdiction, and that there were no other parties in interest in connection with the false report of sale.

For the foregoing reasons the petition for certiorari should be granted and upon hearing of this cause the judg-

ment of the Supreme Court of Illinois and of the Circuit Court of Jefferson County should be reversed.

Respectfully submitted,

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
Attorneys for Petitioners.

.....

Attorney of Record.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

No. 550.

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE, Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, a National Banking Association, KINGWOOD OIL COMPANY, a Corporation, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL; R. J. FRYER and R. F. RATCLIFFE, Co-Partners Doing Business Under the Name and Style of FRYER AND RATCLIFFE; R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS and NIOTAZE POWERS, Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE G. GILBERT, JR.,
J. HARMAN GILBERT,
Mt. Vernon, Illinois,
MOSES PULVERMAN,
Benton, Illinois,
Attorneys for Respondent First National Bank of Woodlawn, Illinois.

JEWELL I. DILSAVER,
RUSSELL B. JAMES,
Mattoon, Illinois,
Attorneys for All Other Respondents (Kingwood Oil Company et al.).

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1943.

No. 550.

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE, Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, a National Banking Association, KINGWOOD OIL COMPANY, a Corporation, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL; R. J. FRYER and R. F. RATCLIFFE, Co-Partners Doing Business Under the Name and Style of FRYER AND RATCLIFFE; R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS and NIOTAZE POWERS, Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Illinois is officially reported in Vol. 383 of the Illinois Reports at Page 515 (383 Ill. 515), is also reported in 50 N. E. (2d) 830, and is included in the record filed herein (R. 371).

JURISDICTION.

The jurisdiction of this Court is invoked by petitioners under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 [28 USCA, Sec. 344 (b)], on the grounds (as claimed by them in their petition for certiorari and supporting brief herein, but not supported by the record) that in the foreclosure proceeding attacked in the instant suit they had no notice of the filing of the Master's report of sale or of the contents thereof or of the execution and delivery of a certificate of purchase to the respondent bank, and no notice of or opportunity to be heard with respect to the entry of the order of June 10, 1941, approving and confirming said report of sale, and were thereby deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and that their Federal claims were asserted in the trial court. It will be observed, however, that in petitioners' jurisdictional statement as to what they set up in their complaint in the trial court (p. 8 of petition for certiorari), they do not state that they raised any question about the order of January 10, 1938, approving the Master's report of conveyance filed on December 9, 1937 (Deft's. Ex. 22, R. 314, 188-190), which order constituted an implied approval and confirmation of the Master's report of sale which had been on file since October 1, 1936, and the Supreme Court of Illinois so held in its opinion in this cause (R. 371, 378). The fact is that in their complaint the petitioners did not even mention said order of January 10, 1938. That order was pleaded by respondents in their answers in the trial court (R. 37-38, 60-61), and in their replies to said answers petitioners merely denied that any order of court was entered approving the Master's report of conveyance (R. 102, 117-118). Petitioners did not allege in their complaint or in their replies any lack of notice of, or opportunity to be heard with respect to, said order of January 10, 1938.

Respondents respectfully submit that this Court is without jurisdiction to review this cause for the following reasons:

(1) Neither in the trial court nor in the Supreme Court of Illinois was there drawn in question the validity of a treaty or statute of the United States; nor was there drawn in question in this cause either in the trial court or in the Supreme Court of Illinois the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.

(2) Neither in the trial court nor in the Supreme Court of Illinois was any title, right, privilege, or immunity specially set up or claimed by either party under the Federal Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

(3) No Federal question of any character was presented for decision or decided in this cause at any stage thereof, either in the trial court or in the Supreme Court of Illinois.

(4) This cause involves only questions of local law, the decision of which by the Supreme Court of Illinois is controlling; and, furthermore, the decision of the Supreme Court of Illinois in this cause is based solely on local laws not involving any constitutional questions.

STATEMENT OF THE CASE.

Petitioners' statement of the case contains several inaccuracies and omits many material facts, but in order to avoid unnecessary repetition, we shall make no statement of the case beyond what is necessary to correct the inaccuracies and omissions in the statement of petitioners.

Inaccuracies in Petitioners' Statement of the Case.

The statement on Page 2 of the petition for certiorari that "An effort was made to obtain service by publication on the petitioner, George F. Wood and wife," is misleading and tends to give the impression that the publication service was questionable or perhaps insufficient, whereas in fact it was perfectly regular and valid (R. 203-210, 188-190). At no stage of the case in the courts below did the petitioners controvert the fact that in the foreclosure suit the court had full and complete jurisdiction of all the parties thereto, including the petitioners herein, and of the subject matter of the action; nor was it disputed by petitioners that the decree of foreclosure was in all respects regular and valid.

The statement on Page 3 of the petition for certiorari that under Rule 7 of the Circuit Court of Jefferson County "H. Glen Wood's counsel became thereafter entitled to receive notice with respect to any subsequent order in the case," and statements substantially to the same effect on Page 5 of the petition and on Page 25 of the supporting brief, as well as the statement on Page 4 of the petition that "No further notice of any kind or character was given to petitioner, H. Glen Wood, or to his attorney, Hassel B. Smith, with respect to any proceedings or orders in the case subsequent to the public notice of the time, place and conditions of the foreclosure sale held on September 5, 1936," and similar statements on Pages 5, 8, 9, 10, 12, 13 and 15 of the petition and on Pages 25, 26, 27 and 39 of the supporting brief, are all mere conclusions on the part of petitioners, entirely without support in the record herein.

The statement on Page 4 of the petition that "No action was taken to secure approval of the report of sale for nearly five years" is inaccurate. On January 10, 1938, the Circuit Court of Jefferson County made and entered an

order in said foreclosure suit approving the Master's report of conveyance filed on December 9, 1937 (Deft's. Ex. 22, R. 314, 188-190), which order was duly recorded in the chancery records of said court (R. 188-190). That order constituted an implied approval and confirmation of the Master's report of sale which had been on file since October 1, 1936, and the Supreme Court of Illinois in its opinion in this cause so held (R. 378).

Material Facts Omitted in Petitioners' Statement of the Case.

In addition to the petitioner, H. Glen Wood (who made a bid at the foreclosure sale), and his wife, there were also present at said sale the petitioner Leaffia Howe and her husband (R. 134-137).

Immediately after the close of the auction, the Master requested H. Glen Wood to accompany him to his office to pay the bid of $800.00, and they immediately left the place of sale and went together to the Master's office nearby. When they arrived there, just a few minutes after the sale, Wood informed the Master that he did not have the money to pay his bid and said he would like to have a few days in which to raise it. The Master immediately informed Curtis Williams, attorney for the bank, of Wood's inability to comply with his bid and of his request for time to raise the money, and in Williams' presence the Master advised Wood that if he (Wood) did not raise the money within a few days, the Master would accept the bid of the bank, issue to it a certificate of purchase and file the report of sale to the bank. H. Glen Wood agreed to this, and so did Williams, as attorney for the bank (R. 145-147, 152-155). At no time subsequent to this conversation did Williams have any discussion about the matter with H. Glen Wood or any of the other petitioners in this suit or any other member of the Wood family (R. 155).

Not only did the Master in Chancery issue a certificate of purchase to the respondent bank on October 1, 1936, containing the same recitals as in the report of sale filed on the same day, but he also filed a duplicate of said certificate in the office of the Recorder of Deeds (R. 147, and Deft's. Ex. 17, R. 311, 188-190). The report of sale was duly recorded by the clerk in the chancery records (Deft's. Ex. 16, R. 311, 188-190), and the duplicate certificate of purchase was likewise duly recorded in the certificate record of said Recorder (Deft's. Ex. 18, R. 311, 188-190).

The Master's report of conveyance stating that on December 9, 1937, pursuant to the decree of foreclosure, he, as Master in Chancery, executed and delivered to the respondent bank a deed to the real estate in question, was not only filed on that day (R. 312-313, 188-190), but it was duly recorded in the chancery records of the Circuit Court (Deft's. Ex. 21, R. 313, 188-190).

During the redemption period following the Master's sale on September 5, 1936, no one made any offer to the Master to redeem the premises in question from the sale (R. 147), and neither during that period nor at any time thereafter did the petitioners herein or any of the other defendants in the foreclosure suit offer to redeem the premises from the bank (R. 158). Not until five years after the sale did the petitioners offer to redeem, when on September 2, 1941, they tendered the redemption money to the Master (R. 142-143), shortly after oil was discovered on the property during the preceding July (R. 184-185).

Following the execution and delivery of the Master's deed of December 9, 1937, to the respondent bank, the defendants in the foreclosure suit (including all the petitioners herein) voluntarily surrendered possession of said premises to the bank some time during the latter part of February, 1938 (R. 157). The bank on February 21, 1938, entered into a written lease with a tenant, Walter Dankwardt, and immediately after the execution of the lease,

the bank, through such tenant, went into possession of the premises and thereafter continuously remained in possession thereof through the same tenant (R. 157). William C. Wood, father of the petitioners herein and one of the defendants in the foreclosure suit, was living on the mortgaged premises when that suit was filed and continued to live there during the redemption period. He and his son (H. Glen Wood) held a public sale some time in February, 1938, and moved off the premises (R. 131, 157).

The respondent bank paid the taxes on said land for the years 1936 to 1940, inclusive, and after going into possession it made some improvements on the premises. After the bank's tenant went into possession, he took full charge of the property, occupying the whole 40-acre tract and cultivating and pasturing it, and paid cash rent to the bank. From the date of the Master's deed, December 9, 1937, until the filing of this suit, none of the petitioners herein nor anyone else questioned the bank's right to possession of the property (R. 157-159).

On April 1, 1940, the said William C. Wood died intestate, leaving as his sole heirs at law the petitioners herein (R. 130).

During the entire pendency of the foreclosure suit, the petitioners H. Glen Wood, Grace Schmidt and Leaffia Howe, all of whom were defendants in that case, were residents of Jefferson County, none of them living more than three miles from the land in question. When the foreclosure suit was filed, the said H. Glen Wood was living just across the highway from the mortgaged property and lived there until March, 1938, when he moved to Mt. Vernon, Illinois, in the same County (Jefferson), and that county continued to be his home and voting place up to the time of the trial of the instant suit (R. 131, 133). From the time the foreclosure suit was filed and up to the time of the trial of the instant suit, the said Grace Schmidt resided continuously in the Village of Woodlawn in Jeffer-

son County, about three miles from the mortgaged premises (R. 158-159). The said Leaffia Howe was living within one-half mile of the mortgaged property when the foreclosure suit was filed and was still living there at the time of trial of the instant suit (R. 135).

The petitioners herein remained as defendants in the foreclosure suit during the entire pendency thereof, and none of them were minors or under any disability whatsoever at the time of the filing of said foreclosure suit or at any time thereafter (R. 190).

No objections or exceptions of any kind were ever filed by any of the defendants in the foreclosure suit or by any of the petitioners herein, or by anyone at all, to the Master's report of sale, filed on October 1, 1936, or to the sale therein reported, or to the Master's certificate of purchase filed on the same day, or to the Master's report of conveyance filed on December 9, 1937, or to the order entered by said Circuit Court on January 10, 1938, approving the Master's report of conveyance, or to any other of the orders or proceedings made and taken in the course of said foreclosure suit, either prior or subsequent to the entry of the decree of foreclosure on July 13, 1936 (R. 231; Deft's. Ex. 29, R. 318, 171); and no proceedings, other than the instant suit, were filed by the defendants in said foreclosure suit, or any of them, to appeal or review said foreclosure proceeding (R. 190).

When the Master's deed was executed on December 9, 1937, the nearest oil and gas production to the land involved in this suit was ten or twelve miles away (R. 185-187). At the time the original well was commenced on said land in June or July, 1941, the nearest production was about a mile away. Kingwood No. 1 well on the land here involved was the discovery well in this field and was drilled for Kingwood by Fryer & Ratcliff. The well was completed as a producer in July, 1941, and put on regular production the latter part of that month. At the time of

trial five wells had been drilled on the 40-acre tract involved in this suit by Kingwood and its co-owners of the lease, all of which wells resulted in production of oil and gas in paying quantities. Up to February 28, 1942, Kingwood and its operating partners had expended in drilling, equipping and operating costs on those five wells the total sum of $76,393, and up to that time had produced therefrom oil of the total value of $289,322. Prior to any drilling on the premises here involved Kingwood Oil Company had no knowledge of any claims to said property on the part of petitioners (R. 184-187).

SUMMARY OF ARGUMENT.

I.

No federal question was presented for decision or decided in this cause at any stage thereof, either in the trial court or in the State Supreme Court, and therefore this Court is without jurisdiction.

Sec. 237 (b) of Judicial Code [28 U. S. C. A., Sec. 344 (b)];

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709;

Louisville & Nashville R. R. Co. v. Louisville, 166 U. S. 709, 41 L. Ed. 1173, 17 S. Ct. 725;

Levy v. Superior Court of City and County of San Francisco, 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769;

Union Mutual Life Ins. Co. v. Kirchoff, 169 U. S. 103, 42 L. Ed. 677, 18 S. Ct. 260;

Michigan Sugar Co. v. Dix, 185 U. S. 112, 46 L. Ed. 829, 22 S. Ct. 581;

Illinois Supreme Court Rule 36, 370 Ill. 37-41;

Illinois Supreme Court Rule 39, 370 Ill. 44-45;

Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 528;

Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350;

Adams v. Russell, 229 U. S. 353, 57 L. Ed. 1224, 33 S. Ct. 846;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451;

Campbell v. Olney, 262 U. S. 352, 67 L. Ed. 1021, 43 S. Ct. 559;

United Gas Public Service Co. v. State of Texas, 303 U. S. 123, 82 L. Ed. 702, 58 S. Ct. 483;

Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129, 65 L. Ed. 549, 41 S. Ct. 276;

Palmer v. State of Ohio, 248 U. S. 32, 63 L. Ed. 108, 39 S. Ct. 16;

Detroit & M. R. Co. v. Fletcher Paper Co., 248 U. S. 30, 63 L. Ed. 107, 39 S. Ct. 13;
Iroquois Transp. Co. v. Delaney Forge & Iron Co., 205 U. S. 354, 51 L. Ed. 836, 27 S. Ct. 509.

II.

The decision of the State Supreme Court rests on adequate and substantial non-federal grounds, and hence this Court is without jurisdiction.

Petrie v. Nampa & Meridian Irrig. Dist., 248 U. S. 154, 63 L. Ed. 178, 39 S. Ct. 25;
New York ex rel. Doyle v. Atwell, 261 U. S. 590, 67 L. Ed. 814, 43 S. Ct. 410;
Arkansas Southern R. R. Co. v. German National Bank, 207 U. S. 270, 52 L. Ed. 201, 28 S. Ct. 78;
Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., 228 U. S. 596, 57 L. Ed. 982, 33 S. Ct. 605;
Speck v. Pullman Palace Car Co., 121 Ill. 33;
Davies v. Gibbs, 174 Ill. 272;
Barnes v. Henshaw, 226 Ill. 605;
Ill. Rev. Stat. 1943, Chap. 77, Sec. 18.

III.

The record in the foreclosure suit being silent on the question whether Rule 7 of the Circuit Court of Jefferson County was complied with in the matter of the confirmation of the Master's sale, and there being no proof in the present suit negativing such compliance, it must be presumed that the rule was duly observed.

Dennison v. Taylor, 142 Ill. 45;
Matthews v. Doner, 292 Ill. 592;
People v. Miller, 339 Ill. 573;
Horn v. Metzger, 234 Ill. 240;
Field v. Peeples, 180 Ill. 376;
Forrest v. Fey, 218 Ill. 165;
Jeffries v. Alexander, 266 Ill. 49;
Grimm v. Grimm, 302 Ill. 511.

IV.

Respondents other than the bank were and are bona fide purchasers.

V.

Petitioners were guilty of laches.

Walker v. Warner, 179 Ill. 16;
Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328;
Hayward v. The Eliot National Bank, 96 U. S. 611, 24 L. Ed. 855.

ARGUMENT.

I.

No Federal Question Was Presented for Decision or Decided in This Cause at Any Stage Thereof, Either in the Trial Court or in the State Supreme Court, and Therefore This Court Is Without Jurisdiction.

Petitioners contend that they set up their claim as to want of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States by alleging in their complaint in the trial court that they had no notice of the filing of the Master's report of sale or of the contents thereof or of the execution and delivery of a certificate of purchase to the respondent bank (R. 6), and no notice of or opportunity to be heard with respect to the entry of the order of June 10, 1941, approving and confirming said report of sale (R. 10). It is not contended by petitioners that they raised or presented for decision any Federal question otherwise than by the above-mentioned allegations in their complaint.

Respondents respectfully submit that said allegations in the complaint were entirely insufficient to present a Federal question for decision or to show that any title, right, privilege or immunity under the Federal Constitution was being relied upon; and respondents further submit that said allegations do not meet the statutory requirements. Section 237 (b) of Judicial Code as amended by the Act of February 13, 1925 [28 U. S. C. A., Section 344 (b)]; that some title, right, privilege or immunity be "specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States." In the allegations in question petitioners made no reference whatever to the Constitution of the United States, nor did they adopt the phraseology of the due-process clause of either

the Fifth or the Fourteenth Amendment to the Federal Constitution, or use any language bearing the remotest similarity to such phraseology. The allegations were totally inadequate to show by clear and necessary intendment that a Federal right was being asserted or to make known to the Court that it was being called upon to adjudicate any Federal right, title, privilege or immunity.

The decision of this Court in *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709, is especially applicable here. In that case it is said:

> "Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the supreme court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege, or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question." * * *
>
> "The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the 14th Amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed the protection of that Amendment against the operation of

that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in U. S. Rev. Stat., Sec. 709. These words were in the 25th section of the judiciary act of 1789 (1 Stat. at L. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular state does not import that he is a citizen of that state. *Brown v. Keene*, 33 U. S. 8 Pet. 115 (8: 886); *Robertson v. Cease*, 97 U. S. 646, 649 (24: 1057, 1059). Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." * * *

"Without further references to adjudged cases, we are of opinion that the general allegation or claim, in different forms, that the decree of the Butler county circuit court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, does not, within the meaning of U. S. Rev. Stat., Sec. 709, specially set up a right or immunity under the 14th Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law."

The decision of this Court in the *Oxley Stave Co. case, supra,* was followed in *Louisville & Nashville R. R. Co. v. Louisville,* 166 U. S. 709, 41 L. Ed. 1173, 17 S. Ct. 725; *Levy v. Superior Court of City and County of San Francisco,* 167 U. S. 175, 42 L. Ed. 126, 17 S. Ct. 769; *Union Mutual Life Ins. Co. v. Kirchoff,* 169 U. S. 103, 42 L. Ed. 677, 18 S. Ct. 260; and many other decisions of this Court.

In *Michigan Sugar Co. v. Dix,* 185 U. S. 112, 46 L. Ed. 829, 22 S. Ct. 581, this Court also said:

"The petition for mandamus nowhere set up that the state of Michigan had passed any law impairing the obligation of a contract with relator, and nowhere invoked the protection of any provision of the Federal Constitution, nor was any issue in relation thereto raised upon the record.

"It is clear that the case did not fall within either the first or second of the classes of cases in which the judgment of a state court may be re-examined under Sec. 709 of the Revised Statutes. The validity of no treaty or statute of, or authority exercised under, the United States, was drawn in question; nor was the validity of a statute of, or an authority exercised under, the state drawn in question on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and its validity sustained. And as to the third class, no right, title, privilege, or immu-

nity was specially set up or claimed as belonging to relator under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and denied.

"The supreme court of the state did not refer to the Federal Constitution, or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the 3d division of Sec. 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or authority, of the United States."

We wish again to remind the Court that in petitioners' jurisdictional statement as to what they set up in their complaint in the trial court (petition for certiorari, p. 8), they do not state that they raised any question about the order of January 10, 1938, approving the Master's report of conveyance filed on December 9, 1937 (Deft's. Ex. 22, R. 314, 188-190). That order constituted an implied approval and confirmation of the Master's report of sale which had been on file since October 1, 1936, and the Supreme Court of Illinois so held in its opinion in this cause (R. 371, 378). In their complaint, petitioners did not even mention said order of January 10, 1938, and after respondents had pleaded that order in their answer in the trial court (R. 37-38, 60-61), petitioners in their replies to said answers merely denied that said order had been entered. They did not allege in their complaint or in their

replies any lack of notice of, or opportunity to be heard with respect to, said order of January 10, 1938. Consequently, by no stretch of the imagination can it be said that petitioners "specially set up or claimed" any Federal right with reference to the order of January 10, 1938, which order amounted to a confirmation of the sale.

But even if, by the most liberal interpretation of the allegations relied upon by petitioners as constituting the assertion of Federal claims in the trial court, it could be said that petitioners "specially set up or claimed" a Federal right or presented a Federal question to the trial court for decision, nevertheless, no Federal question of any character was presented for decision to the State Supreme Court or decided by it, and consequently this Court is without jurisdiction herein regardless of the question whether a Federal right was asserted in the trial court.

The transcript of the record filed herein does not include the briefs filed in the State Supreme Court and therefore does not show, except as indicated in the opinions filed in the case (R. 328, 371), what errors were assigned by petitioners in that Court and what propositions of law were urged and relied upon therein by them as grounds for reversal of the trial court's judgment. Rule 36 of the Supreme Court of Illinois (370 Ill. 37-41) provides among other things that:

> "No assignment of errors or of cross-errors shall be necessary, except the statement in the brief, at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in Rule 39."

And Rule 39 of that Court (370 Ill. 44-45) provides with reference to the brief of appellant that:

> "The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for a reversal or of the cross-errors submitted by an appellee not prosecuting a cross-appeal. * * * No alleged error or point not

contained in such brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Consequently, there being no showing in the transcript filed herein of the brief of appellants (petitioners here) filed in the State Supreme Court, it cannot be known to this Court from the transcript exactly what errors were assigned by petitioners as appellants in the State Supreme Court and what points of law were presented and relied upon therein by them as grounds for reversal of the decree of the trial court. However, we consider it to be our duty to make known to this Court precisely what petitioners' assignments of error were as appellants in the State Supreme Court and what propositions of law were urged and relied upon by them in that Court as grounds for reversal.

The errors which petitioners, as appellants in the State Supreme Court, relied upon as grounds for reversal were set out as follows in their brief filed in that Court:

"1. The Court erred in dismissing the complaint of appellants for want of equity and in entering a decree against appellants for costs.

"2. The Court erred in refusing to grant the relief prayed for in appellants' complaint.

"3. The Court erred in refusing to decree that appellants are entitled to redeem from the decree for foreclosure.

"4. The Court erred in refusing to hear certain testimony offered by appellants.

"5. The Court erred in admitting certain evidence offered by appellees.

"6. The Court erred in refusing to decree that appellants are entitled to redeem under the statute.

"7. The Court erred in refusing to decree that appellants are entitled to redeem in equity.

"8. The Court erred in refusing to decree that the Master's report of sale and the certificate of purchase and deed executed by the Master in Chancery were a nullity, void and a cloud upon the title of appellants.

"9. The Court erred in refusing to decree that the oil and gas leases and deeds executed by appellees are void and clouds upon title of appellants."

The propositions of law presented and argued by petitioners in their said brief as appellants in the State Supreme Court were as follows:

"I. A freehold is involved and this appeal is properly taken to this Court.

"II. The Circuit Court was without power or jurisdiction to authorize the course of conduct pursued by the Master in Chancery and there was no sale under the foreclosure decree.

"III. A sale or conveyance made in a manner not prescribed by the decree for foreclosure is a nullity and the Court is without power to approve such a sale.

"IV. The foreclosure suit is properly reviewed in this proceeding, brought less than ninety days after the entry of the order purporting to approve the Master's report of sale.

"V. The defenses of laches, estoppel and bona fide purchase are not available to appellees."

Certainly, no argument is necessary to demonstrate that neither in their assignments of error in the State Supreme Court nor in the propositions of law set up and relied upon in their brief in that Court as grounds for reversal of the trial court's judgment did the petitioners present for decision to the State Supreme Court any Federal question whatsoever. It is perfectly apparent from the above-mentioned assignments of error and propositions of law relied upon by petitioners in their brief in the State Su-

preme Court that they presented to that Court for decision nothing but questions of local law.

The opinion rendered by the Supreme Court of Illinois in this cause (R. 371-379) shows unmistakably that that Court decided no Federal question of any character, but only questions of local law.

To give this Court jurisdiction to review a State Court decision, it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. On this point, in *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751, this Court said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause; that the Federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *De Saussure v. Gaillard*, 127 U. S. 216, 234, 32 L. Ed. 125, 132, 8 S. Ct. 1053; *Johnson v. Risk*, 137 U. S. 300, 306, 307, 34 L. Ed. 683, 686, 11 S. Ct. 111; *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U. S. 293, 295, 297, 35 L. Ed. 193-195, 11 S. Ct. 528; *Whitney v. California*, 274 U. S. 357, 360, 361, 71 L. Ed. 1095, 1099, 1100, 47 S. Ct. 641; *Lynch v. New York*, 293 U. S. 52, 54, 79 L. Ed. 191, 192, 55 S. Ct. 16."

To the same effect are *Honeyman v. Hanan*, 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476; *Adams v. Russell*, 229 U. S.

353, 33 S. Ct. 846, 57 L. Ed. 1224; and numerous other decisions of this Court, many of which are collected under Notes 41 and 49 of the Annotations to Section 344 of 28 U. S. C. A. (Section 237, Judicial Code).

Decisions of state courts on matters of local law not involving constitutional questions are controlling and not subject to review by this Court. Thus, in *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107, it is said:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

In *Campbell v. Olney*, 262 U. S. 352, 43 S. Ct. 559, 67 L. Ed. 1021, this Court also said:

> "The judgment of that court necessarily determines that the state laws were complied with. Unless a Federal right is involved, the state court's application of local laws will not be reviewed here. *Hallinger v. Davis*, 146 U. S. 314, 319, 36 L. Ed. 986, 989, 13 Sup. Ct. Rep. 105; *Peters v. Broward (Peters v. Gilchrist)*, 222 U. S. 483, 492, 56 L. Ed. 278, 283, 32 Sup. Ct. Rep. 122; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 234, 50 L. Ed. 451, 456, 26 Sup. Ct. Rep. 232; *Wade v. Travis County*, 174 U. S. 499, 508, 43 L. Ed. 1060, 1064, 19 Sup. Ct. Rep. 715; *Osborne v. Florida*, 164 U. S. 650, 654, 41 L. Ed. 586, 587, 17 Sup. Ct. Rep. 214; *Bardon v. Land & River Improv. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719, 721, 15 Sup. Ct. Rep. 650; *Missouri v. Lewis (Bowman v. Lewis)*, 101 U. S. 22, 32, 33, 25 L. Ed. 989, 992, 993."

And again, in *United Gas Public Service Co. v. State of Texas,* 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702, this Court said:

> "It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted Federal rights."

To the same effect are: *Hartford Life Ins. Co. v. Blincoe,* 255 U. S. 129, 41 S. Ct. 276, 65 L. Ed. 549; *Palmer v. State of Ohio,* 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108; *Detroit & M. R. Co. v. Fletcher Paper Co.,* 248 U. S. 30, 39 S. Ct. 13, 63 L. Ed. 107; *Iroquois Transp. Co. v. DeLaney Forge & Iron Co.,* 205 U. S. 354, 27 S. Ct. 509, 51 L. Ed. 836; and many other decisions of this Court cited in Notes 71 to 75 and 81 of the Annotations to Section 344 of 28 U. S. C. A.

In their supporting brief petitioners devote considerable space (petition for certiorari, pp. 27-28) to a criticism of the Supreme Court of Illinois in this case because of its holding that petitioners' complaint, so far as it sought to impeach the foreclosure proceedings, amounted to a bill of review and that the action could not be maintained as a bill of review because the complaint did not meet the well-settled requirements of such a bill. In this connection we desire to point out that in petitioners' brief as appellants in the State Supreme Court they said as a part of their statement of the case that the suit was brought "to quiet title to certain land located in that county, to cancel as a cloud upon the title a certificate of purchase and deed executed by the Master in Chancery of the Circuit Court of Jefferson County, *to review a suit to foreclose a mortgage* and to redeem from a decree for foreclosure, and to cancel and remove other conveyances and recorded instruments as clouds upon title." Furthermore, as will be observed from the propositions of law which petitioners urged in said brief in the State Supreme Court and which are hereinbefore quoted, their fourth proposi-

tion was that "the foreclosure suit is properly reviewed in this proceeding, brought less than ninety days after the entry of the order purporting to approve the Master's report of sale." It is therefore obvious that one of the theories on which petitioners submitted the case to the State Supreme Court was that the suit was a bill of review.

We also wish to mention that the statement on page 35 of petitioners' brief herein that the attorney for the respondent First National Bank of Woodlawn presented the order approving the sale, and the statement on page 37 of said brief to the effect that the respondents procured the entry of said order, are without any support whatever in the record. The record does not show that anyone other than the Master in Chancery presented or had anything to do with the entry of either the order of January 10, 1938, approving the Master's report of conveyance (R. 314), or the order of June 10, 1941, approving the Master's report of sale (R. 230).

The cases cited in the petition for certiorari and supporting brief do not support petitioners' contentions that they were deprived of property without due process of law and that a Federal question was involved in the decision of the State Supreme Court. This Court will no doubt examine those cases and so we shall not prolong this brief by analyzing them in detail to show their inapplicability to the case at bar. Suffice it to say that each of them deals with a factual situation totally dissimilar to that in the instant suit and that an examination of them readily discloses that they are not in point here.

The transcript of the record filed herein does not purport to be complete. As we have already mentioned, it omits entirely the briefs filed in the State Supreme Court and consequently does not show what questions were presented to that Court for decision nor what the issues were in that Court. It does not include the trial court record,

but only an abstract thereof. The certificate of the Clerk of the Supreme Court of Illinois to said transcript (R. 382-383) does not state that it is a complete transcript of the record in the case, including the proceedings in that Court, but that the transcript contains a true copy of "the abstract of record filed August 24, 1942," and copies of certain enumerated portions of the proceedings in the State Supreme Court. Rule 38 of this Court requires that a petition for review on writ of certiorari of a decision of a State Court of last resort "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the Court to which the writ is asked to be directed." We understand this rule to mean that the transcript of the record must be complete, and show all the proceedings in the case, including those in the trial court as well as those in the Court to which the writ is asked to be directed. If this be the correct interpretation of the rule, respondents respectfully submit that the transcript of the record filed herein by petitioners does not meet the requirements of Rule 38 of this Court and that this is a sufficient reason for denying the petition for a writ of certiorari.

II.

The Decision of the State Supreme Court Rests on Adequate and Substantial Non-Federal Grounds, and Hence This Court Is Without Jurisdiction.

An examination of the final opinion of the State Supreme Court in this cause (R. 371-379) discloses that the decision of the Court is based entirely on local law. The opinion shows that the grounds of the decision were:

(1) That under the settled law of the State, the complaint, so far as it sought to impeach the foreclosure proceeding, amounted to a bill of review;

(2) That the complaint did not meet the requisites of a bill of review under the local law in that:

(a) The foreclosure proceeding appeared on its face to be regular and the deeds executed by the Master to have been fully authorized by court action, and there was nothing in the facts alleged or in the prayer that would furnish grounds for relief to correct error appearing upon the face of the record;

(b) The complaint could not be sustained as a bill to bring in newly discovered evidence because the facts upon which petitioners sought to impeach the former record were known to them or could have been ascertained immediately after the Master filed the duplicate of the certificate of purchase with the Recorder on October 1, 1936, and petitioners did not explain their failure to present the evidence of the irregularity of the Master in the foreclosure proceeding or make the requisite showing of diligence to obtain such evidence; and,

(c) The action was a collateral attack on the foreclosure proceeding and could not be maintained as a bill of review based on the fraud of the Master, because the fraud complained of was intrinsic and therefore not of the character for which a judgment or order may be impeached;

(3) That petitioners had no right to redeem, and the suit could not be maintained as one for redemption, because:

(a) The statutory period of redemption had expired before petitioners tendered to the Master the necessary amount to redeem and before they commenced this suit; and,

(b) Under the settled law of the State, no grounds had been shown sufficient to warrant a court of equity in granting petitioners the right to redeem after the statutory period of redemption had expired.

Certainly, no argument is necessary to demonstrate that the decision of the State Supreme Court rests on adequate and substantial non-Federal grounds.

In *Petrie v. Nampa & Meridian Irrig. Dist.*, 248 U. S. 154, 63 L. Ed. 178, 39 S. Ct. 25, this Court said:

> "But the second ground of the motion to dismiss is valid, viz., that, even if it be conceded that the supreme court decided a Federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any Federal question and broad enough to support the judgment, and for this reason the Federal question involved will not be considered on this writ of error, under a series of decisions by this court, extending at least from *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635, 637, to *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 Sup. Ct. Rep. 318."

In *New York ex rel. Doyle v. Atwell*, 261 U. S. 590, 67 L. Ed. 814, 43 S. Ct. 410, this Court again announced the rule as follows:

> "It is settled law that where the record discloses that the judgment of a state court was based not alone upon a ground involving a Federal question, but also upon another and independent ground, broad enough to maintain the judgment, this court will not take jurisdiction to review such judgment, and will dismiss a writ of error brought for that purpose. *Eustis v. Bolles*, 150 U. S. 361, 366, 37 L. Ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 69, 41 L. Ed. 72, 74, 16 Sup. Ct. Rep. 939; *Allen v. Arguimbau*, 198 U. S. 149, 155, 49 L. Ed. 990, 993, 25 Sup. Ct. Rep. 622; *Adams v. Russell*, 229 U. S. 353, 358, 57 L. Ed. 1224, 1226, 33 Sup. Ct. Rep. 846; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 304, 61 L. Ed. 1153, 1157, 37 Sup. Ct. Rep. 643."

To the same effect are *Arkansas Southern R. R. Co. v. German National Bank*, 207 U. S. 270, 52 L. Ed. 201, 28 S. Ct. 78; *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 228 U. S. 596, 57 L. Ed. 982, 33 S. Ct. 605; and many other decisions of this Court cited in Note 50 of the Annotations to Section 344 of 28 U. S. C. A.

The contention of petitioners that the State Supreme Court ignored and refused to pass upon their claim as to lack of notice of, and an opportunity to be heard with respect to, the entry of the order of June 10, 1941, is entirely untenable. On this point, the State Supreme Court, in its final opinion (R. 374-375) said, "Plaintiffs do not explain their failure to present the evidence of the irregularity of the Master in the foreclosure proceeding other than to say they had no notice that the Master was making application to have the report of sale and report of deed approved. In this character of action where a showing of diligence is requisite to the maintenance of the suit, a plaintiff does not show diligence by the mere assertion that he had no notice that the court was going to enter an order when, fact as a fact, he was a party to the action. It requires evidence of affirmative acts on his part, something to show that he was faithfully endeavoring to obtain the evidence which he now offers but for some unavoidable reason was not able to discover."

Moreover, the contention of petitioners that they had no notice of, or opportunity to be heard with respect to, the Master's report of sale and the confirmation thereof, is without the slightest merit or foundation. They were all parties defendant to the foreclosure suit and were duly served with process. As parties to the suit, they were required to follow the course of the proceeding and were bound to take notice of the Master's report of sale and of the contents thereof. After the report of sale was filed on October 1, 1936, petitioners had ample opportunity—more than fifteen months before the entry of the order of

January 10, 1938, approving the Master's report of conveyance and by implication approving also the Master's report of sale—in which to file in the foreclosure suit any and all objections or exceptions that they may have seen fit to file to the report of sale and to the sale therein reported, and to present as exceptions to the Master's report all the matters and questions they sought to litigate in the instant suit. However, they filed no such objections or exceptions, but allowed the sale to be confirmed without protest; and there is no showing of any kind in the present suit that petitioners were in any way misled or prevented from filing in the foreclosure suit any and all objections and exceptions to the Master's report of sale that they may have cared to file. As stated by the Supreme Court of Illinois in its first opinion in this cause (R. 332), "It was their duty, if they desired to question the validity of such report of sale, to file objections with the circuit court, to whom the report was made, and in case of adverse ruling they would have had the right to appeal from the decree in the premises." Under the rule, well settled in Illinois (*Speck v. Pullman Palace Car Co.*, 121 Ill. 33; *Davies v. Gibbs*, 174 Ill. 272, and *Barnes v. Henshaw*, 226 Ill. 605), as well as in other jurisdictions, the order of confirmation in the foreclosure suit was conclusive as to all matters upon which the Court might have been called upon to pass, had the parties chosen to bring them forward as objections to the confirmation.

As pointed out by the State Supreme Court in its final opinion (R. 379), "There was no showing of fraud or unfairness that prevented plaintiffs from redeeming within the statutory period. The conduct of the Master in making his report of sale did not prevent plaintiffs from redeeming from the sale." They had the right at any time within twelve months from the sale to redeem by paying to the purchaser (the respondent bank) or to the Master in Chancery, for the benefit of the purchaser, "the sum

of money for which the premises were sold or bid off, with interest thereon at the rate of 6 per cent per annum from the time of such sale" (Ill. Rev. Stat. 1943, Chap. 77, Sec. 18). However, not until five years after the sale did the petitioners offer to redeem when, on September 2, 1941, they tendered the redemption money to the Master (R. 142-143), shortly after oil was discovered on the property during the preceding July (R. 184-185).

III.

The Record in the Foreclosure Suit Being Silent on the Question Whether Rule 7 of the Circuit Court of Jefferson County Was Complied With in the Matter of the Confirmation of the Master's Sale, and There Being No Proof in the Present Suit Negativing Such Compliance, It Must Be Presumed That the Rule Was Duly Observed.

Petitioners place much reliance upon Rule 7 of the Circuit Court of Jefferson County (R. 363-364) in connection with their claim as to lack of notice of, or opportunity to be heard with respect to, the entry of the order of June 10, 1941.

By way of introduction to our discussion under this proposition, we make the following preliminary remarks, namely: That there is no requirement in Rule 7 for notifying anyone but opposing counsel of record, nor any provision for service of notice upon any party litigant; that the rule in question does not require that the record in a particular case show on its face compliance with said rule; that the rule, by its express terms, does not apply to parties in default, and that H. Glen Wood was the only defendant in the foreclosure suit who entered any appearance or filed any pleading therein, all the other defendants having defaulted.

Even if it be assumed that compliance with Rule 7 was

either necessary or required in connection with the confirmation of the Master's sale, which respondents deny, there being nothing in the record in the foreclosure suit showing affirmatively that said rule was not complied with, and there being no proof in the present suit of noncompliance with said rule, it must be presumed in support of the court's jurisdiction that the rule was duly observed.

It is scarcely necessary to say that in the foreclosure suit the Circuit Court was acting as a court of general jurisdiction. It is a fundamental principle that when the judgment of a court of general jurisdiction, acting within the ordinary scope of that jurisdiction, is attacked collaterally, every presumption will be indulged in favor of the court's jurisdiction, unless it affirmatively appears on the face of the record that the court was without jurisdiction, and everything not negatived by the record will be presumed in support of the judgment. There can be no doubt that under the law of Illinois this suit is a collateral attack on the mortgage foreclosure proceedings (*Dennison v. Taylor*, 142 Ill. 45; *Matthews v. Doner*, 292 Ill. 592).

In *People v. Miller*, 339 Ill. 573, the Supreme Court of Illinois said at page 579:

> "It is a well-established and universally recognized rule that when the judgment of a court of general jurisdiction, acting within the ordinary scope of that jurisdiction, is attacked collaterally, every presumption is made in favor not only of the proceedings, but of the Court's jurisdiction, unless it affirmatively appears on the face of the record that the court was without jurisdiction (*Kenney v. Greer*, 13 Ill. 432; *Clark v. Thompson*, 47 id. 25; *Forrest v. Fey*, 218 id. 165; *Galpin v. Page*, 18 Wall. 350)."

And, again, in *Horn v. Metzger*, 234 Ill. 240, it is said, at page 243:

> "It is a rule of uniform application in relation to superior courts or courts of general jurisdiction, that nothing is to be presumed to be out of their jurisdiction, but that which specially appears to be so. Where the record of a judgment or decree is relied on in a collateral proceeding, jurisdiction must be presumed in favor of a court of general jurisdiction, although it is not alleged and does not appear in the record (*Swearengen v. Gulick*, 67 Ill. 208; *Benefield v. Albert*, 132 id. 665; *Nickrans v. Wilk*, 161 id. 76; *Cassell v. Joseph*, 184 id. 378)."

To the same effect are *Field v. Peeples*, 180 Ill. 376; *Forrest v. Fey*, 218 Ill. 165; *Jeffries v. Alexander*, 266 Ill. 49; *Grimm v. Grimm*, 302 Ill. 511, and many other decisions of the Illinois Supreme Court.

The petitioners having by this suit attacked the jurisdiction of the court to approve and confirm the Master's sale in the foreclosure suit, it is, of course, elementary that the burden was on them to prove a want of such jurisdiction and to overcome the presumption existing in favor of the Court's jurisdiction.

The record in the foreclosure suit is silent on the question whether Rule 7 was complied with or whether the attorney of record for H. Glen Wood was present in court at the time of the confirmation of the Master's sale or was notified of such hearing in accordance with said rule, and there is no proof nor offer of proof in the instant suit to show that said attorney was not present in court at said time or that he was not so notified. It therefore follows, under the authorities above cited concerning the presumption in favor of an order, judgment or decree of a court of general jurisdiction, that it must be presumed that Rule 7 of the Circuit Court of Jefferson County, even if applicable, which respondents deny, was duly complied with in connection with the confirmation of the Master's sale, there being nothing in the record herein to show the contrary.

At the close of the trial and by way of rebuttal evidence, petitioners made the following offer of proof (R. 192):

> "Mr. Murray: I will offer to prove by this witness that none of the plaintiffs in this cause nor their intestate, William C. Wood, had any notice of any kind or character of any action taken or proceedings had in cause No. 35-2316, chancery, in the Circuit Court of Jefferson County, Illinois, following the 5th day of September, 1936. And I offer to prove the same by each of the plaintiffs."

An objection to this offer was sustained and the tender denied, but even if the offer had been received, no lack of compliance with Rule 7 of the Circuit Court would have been shown, since no offer was made to prove that the attorney for H. Glen Wood (the only defendant who entered any appearance in the case) was not present in court at the time of the confirmation of the Master's sale or that he was not notified of such hearing in accordance with said rule. Said offer was the only one made by petitioners herein during the trial of this cause in an attempt to show a noncompliance with said Rule 7, and, for the reasons we have already set out, the offer was entirely insufficient to show a failure to comply with that rule.

IV.

Respondents Other Than the Bank Were and Are Bona Fide Purchasers.

On March 3, 1938, First National Bank of Woodlawn, Illinois, executed an oil and gas lease to Kingwood Oil Company covering the land here involved and another 40-acre tract adjoining it on the north, the lease being for a term of five years from its date and as long thereafter as oil, gas, casinghead gas, casinghead gasoline or any of them is produced from the leased premises (Defts. Ex. 26,

R. 315, 235, 166). The consideration for the lease was $11.00 an acre. The lease was not delivered on that day, but was attached to a draft drawn on Kingwood Oil Comuany for $880.00, the purchase price, and was forwarded by First National Bank of Woodlawn to another bank at Effingham, Illinois, for collection (R. 159-162; Defts. Ex. 27, R. 315, 169). After the lease was executed and prior to the delivery of it and the payment of the consideration for the lease, Kingwood Oil Company, through one of its employees in its land department, examined the public records at the Jefferson County Courthouse with reference to the title to the leased premises. Because of the short term of the draft and of the fact that the abstracters in Jefferson County were then so busy, the company could not procure an abstract of title to be made and have it examined before the due date of the draft. From such inspection of the public records, the company learned about said foreclosure suit on the land here involved and procured a complete transcript of the record in said suit, in the form of photostatic copies of all the original court files in the case, and submitted said transcript to the law firm of Scholfield & Purdunn, of Marshall, Illinois, for examination. Said firm, after examining the transcript, wrote an opinion to Kingwood Oil Company on March 11, 1938, approving said foreclosure proceeding and the title of First National Bank of Woodlawn to the land here involved and to the other tract included in the same lease. In this title opinion reference was also made to another foreclosure suit and a partition suit, neither of which affected the land involved in the instant case but pertained only to the other 40-acre tract also covered by said lease. Kingwood Oil Company withheld payment of the draft until receipt of said title opinion, which was in its possession when it paid the draft on March 18, 1938, and received delivery of said oil and gas lease. The company relied on said opinion in paying the draft and accepting

the lease (R. 163-167, 169-171; Defts. Ex. 27, 28 and 29, R. 315-318, 169, 171). Prior to the delivery of said lease and the payment of the consideration therefor, the Kingwood Oil Company had no notice of any claim to the land here involved on the part of anyone other than First National Bank of Woodlawn (R. 163-164, 166).

On August 17, 1938, Kingwood Oil Company executed and delivered to Alfred J. Williams an assignment of an overriding royalty interest in said lease and other leases amounting to an undivided one-sixteenth of the lessee's seven-eighths working interest in the oil, gas, etc. (R. 242; Defts. Ex. 35, R. 320, 175). The consideration for the assignment was the making of a loan of $150,000 by said Alfred J. Williams to Kingwood Oil Company. The loan was made on August 17, 1938, the same day on which the assignment was executed (R. 173-175).

On June 14, 1941, Kingwood Oil Company assigned to James F. Breuil an undivided one-fourth interest in said oil and gas lease (Defts. Ex. 31, R. 318, 172). The consideration for said assignment was $1,000 and was paid by Breuil to Kingwood Oil Company on June 18, 1941, at which time the assignment was delivered to him. Before receiving the assignment and paying the consideration for it, Breuil had the title to the leased premises examined by his attorneys, who gave him an approval on the title of the bank to the land in question. At the time of the delivery of the assignment and the payment of the consideration for it, Breuil had not heard or been advised of any claim on the part of plaintiffs herein to the land involved in this suit, nor heard at that time of any claims to said land on the part of anyone other than First National Bank of Woodlawn, nor had he heard at that time of any claims adverse to Kingwood Oil Company (R. 172-173; Defts. Ex. 32, R. 319, 172).

On June 14, 1941, Kingwood Oil Company executed and delivered to Walter Duncan an assignment of an un-

divided one-fourth interest in said oil and gas lease (R. 245; Defts. Ex. 38, R. 321, 181) for a consideration of $1,000 paid by Duncan to Kingwood about the same day. Before receiving the assignment and paying the consideration for it, he inquired of the legal department of Kingwood Oil Company whether the title was all right. Prior to the delivery of the assignment to him and prior to his paying the consideration for it, Duncan had not learned or been advised of any claims on the part of plaintiffs herein to the land involved in this suit, nor had he learned or been advised at that time that anyone was making any claims to the land adverse to the title of the bank (R. 180-181).

On July 7, 1941, Kingwood Oil Company executed and delivered to R. J. Fryer and R. F. Rateliff, who were copartners doing business under the name and style of Fryer & Rateliff, an assignment of an undivided one-fourth interest in said lease, the assignment being received by them as copartners. In consideration for this assignment, Fryer & Rateliff drilled the discovery well on the leased premises at a cost to them of about $4,000. Prior to their drilling of said well and prior to the execution and delivery of the assignment to them, Fryer & Rateliff understood that the legal department of Kingwood Oil Company had examined the title to the leased premises and had approved it. Prior to the time the assignment was delivered to them and prior to the time they drilled the well, Fryer & Rateliff had not learned or been advised of any claim on the part of plaintiffs herein to the land involved in this suit or of any claim of title to said land by anyone other than the bank (R. 175-177, 275; Defts. Ex. 36, R. 320, 177).

On July 11, 1941, Alfred J. Williams and wife executed and delivered to Roy Powers an assignment of an overriding royalty interest amounting to an undivided one-sixty-fourth of the lessee's seven-eighths working interest

in the oil, gas, etc., in said oil and gas lease (R. 278; Defts. Ex. 40, R. 321, 182-193). This assignment was made to Powers in consideration for his services in arranging to have a well drilled on the leased premises. He procured Fryer & Ratcliff to drill the well and took the assignment of the overriding royalty interest in payment for his work in effecting the deal to get the well drilled (R. 182-183).

On July 14, 1941, R. J. Fryer and R. F. Ratcliff and their respective spouses assigned to Roy Powers an undivided one-eighth interest in said oil and gas lease (R. 280; Defts. Ex. 33, R. 320, 187), which interest was in turn assigned on July 15, 1941, by Roy Powers and wife to Kingwood Oil Company (R. 283; Defts. Ex. 34, R. 320, 188).

On June 26, 1941, the bank executed and delivered to E. A. Obering a mineral deed covering an undivided one-half interest in the oil and gas underlying and that might be produced from the land in question and the forty-acre tract adjoining it on the north. The consideration for this deed was $3,000 and was paid by Obering to the bank either on the date of the deed or the day before. When receiving the deed and paying the consideration for it Obering relied upon Kingwood's examination of title and its approval of title. At the time said mineral deed was delivered to him and prior to his paying the consideration for it, Obering had not learned or been advised that any of the plaintiffs in this case were making any claims to the ownership of the land involved in this suit or were claiming any right of redemption thereof, or that anybody else was asserting any claim to said land adverse to the title of the bank (R. 177-178, 285; Defts. Ex. 37, R. 321, 178).

On June 26, 1941, E. A. Obering and wife executed and delivered to Walter Duncan a mineral deed covering an undivided one-fourth interest in the oil and gas underlying and that might be produced from the land in question

and the said adjoining forty-acre tract, for a consideration of $1,650, paid by Duncan to Obering on the same day. At the time of the delivery of this deed and the payment of the consideration therefor, Duncan had not learned or been advised of any claim to said land on the part of plaintiffs herein or of any claim to the land adverse to the title of the bank (R. 181-182, 288; Defts. Ex. 39, R. 321, 182).

The statement of petitioners in their supporting brief (p. 36) that the foreclosure proceedings were not regular on their face is, we submit, without any foundation whatever in the record herein, and petitioners point to nothing which tends, in the slightest degree, to support such statement.

In the opinion of the State Supreme Court in this cause it is stated that "The foreclosure proceeding appeared on its face to be regular and the deeds executed by the master to have been fully authorized by court action."

The record in the foreclosure suit showed that the Court had full and complete jurisdiction of all the parties and of the subject matter of the action; that a decree of foreclosure in regular form had been duly entered; that the Master had duly advertised the sale, and that at the time and place stated in the notice of sale he had sold the mortgaged premises at public auction to the respondent bank as the highest and best bidder at the sale; that no objection of any kind had been filed to the sale or to the Master's report thereof; that the sale had been duly approved and confirmed by the court, and that a master's deed in regular form had been duly issued to the bank and recorded. Nothing appeared in the foreclosure suit or in any of the other public records which even tended to show that H. Glen Wood, or anyone other than the Bank, had made a bid at the Master's sale, or that any of the defendants in the foreclosure suit, or any of the petitioners herein were asserting any claim what-

ever to the premises in question. The bank was in possession of the property and had been at all times subsequent to some date in February, 1938, which was prior to the time any of the respondents, other than the bank, purchased their respective interests. There is not a scintilla of evidence in the record herein which in the slightest degree tends to show that the respondents other than the bank had at the time of their respective purchases any notice, either actual or constructive, that H. Glen Wood had made a bid at the Master's sale, or that any of the defendants in the foreclosure suit or any of the petitioners herein claimed any right, title or interest in the premises in question.

On page 37 of their brief herein, petitioners refer to the title opinion of March 11, 1938, which Kingwood Oil Company obtained from Messrs. Scholfield and Purdunn and attempt to give the impression that because this opinion was rendered eight days after the execution of the oil and gas lease from the respondent bank to Kingwood Oil Company, said Company did not rely upon the public records and the record in the foreclosure suit in purchasing the lease.

We have hereinbefore set out under this proposition the facts in detail concerning the purchase of said lease by Kingwood Oil Company, its investigation of the title, its payment of the consideration for the lease, and the want of notice to it of any claim to the land here involved on the part of anyone other than the respondent bank, which undisputed facts appearing in the record herein entirely refute petitioners' implications that Kingwood Oil Company was not a bona fide purchaser of its lease and that it did not rely upon the public records and the record in the foreclosure suit in making such purchase.

Respondents respectfully submit that the facts hereinbefore set out under this proposition, and appearing in

the record herein, show that the respective purchases by the respondents other than the bank were each made in good faith, for a valuable consideration, and in full reliance upon the public records and the record in said foreclosure suit and without any notice whatever of any claim on the part of petitioners herein, or any or either of them, to any right, title or interest in the premises in question or to any right of redemption thereof, and that such facts abundantly support the trial court's finding that the respondents other than the bank were and are bona fide purchasers for value and without notice of the petitioners' claims.

V.

Petitioners Were Guilty of Laches.

The petitioners herein were all parties to the foreclosure suit and were duly served with process. They were required to follow the course of the proceeding and were bound to know that the Master made a report on October 1, 1936, that the property had been sold to the respondent First National Bank of Woodlawn. Although they had ample opportunity to do so, they filed no objections to the report of sale, but allowed the sale to be confirmed without protest. There is no showing of any kind, either in the pleadings or in the evidence in this case, that petitioners were in any manner misled or prevented from exercising their right of redemption within the time and in the manner provided by statute; neither is there any allegation or proof explaining or excusing their failure and neglect to redeem from the sale within the statutory period. They had a whole year from the date of the Master's sale in which to redeem by paying merely the debt, interest and costs, which was the amount of the bank's bid.

The defenses of laches, acquiescence and abandonment were especially pleaded in the answers of respondents (R.

27-98). The record in this case conclusively shows that the petitioners slept upon their alleged rights and were barred from equitable relief. The record also shows that the Master's sale was held on September 5, 1936; that not until September 2, 1941, did the petitioners tender the redemption money to the Master, and that this suit was not filed until September 5, 1941, which was exactly five years from the date of the Master's sale.

The record further shows that neither H. Glen Wood nor any of the other petitioners did one solitary thing after the date of the sale to assert the claims which they make in the instant suit or to protect any rights or interests which they may have had in connection with the foreclosure suit. For five long years they sat by in total inaction and in utter silence until September, 1941, following the discovery of oil on the lands in question in the preceding July.

Nowhere in this case have petitioners, by way of excuse or explanation for their gross laches, pointed out one single act or thing that was done or attempted to be done by H. Glen Wood, or any of the other petitioners herein, during the five-year period from September, 1936, to September, 1941, either to protect their alleged rights or to give notice to respondents or to anyone else of their alleged claims.

The petition for certiorari and supporting brief herein echo and re-echo with the cry of "no notice," but it is to be noted that nowhere do petitioners make the slightest mention of the true facts conclusively shown by the record in this case, from which H. Glen Wood and the other petitioners were necessarily put on notice and inquiry which would have led to immediate full knowledge that the sale had been reported as made to the respondent Bank, followed in due course by a Master's deed to the mortgaged premises, the filing of the Master's report of conveyance and the approval thereof by the Court.

The record in this case discloses that all the petitioners, except H. Glen Wood, were defaulted in the foreclosure suit, and further shows that H. Glen Wood was advised by the Master in Chancery, at the latter's office, immediately following the sale, and in the presence of Curtis Williams, the attorney for the Bank, that if he failed to make his bid good the Master was going to accept the bid of the Bank and issue the certificate of sale and report the sale to the Bank; the record further discloses that H. Glen Wood then stated that that was all right with him (R. 146, 154). The testimony of the Master and of Curtis Williams as to the conversation just referred to was not denied by H. Glen Wood, and no attempt was made to refute the testimony of these witnesses, although H. Glen Wood took the stand in rebuttal (R. 192). Furthermore, the record discloses that on September 21, 1936, the Master wrote a letter to H. Glen Wood, again advising him that he would have to pay the amount of his bid by the first of October (R. 222-223, 133), and this letter was received by him on September 22, 1936 (R. 133). Most certainly, under these circumstances, H. Glen Wood is estopped to assert that he was not advised and not notified that the premises were to be sold to the Bank.

The evidence shows that following the execution of the Master's deed to the Bank, and some time during the latter part of February, 1938, the defendants in the foreclosure suit voluntarily surrendered possession of the property to the Bank (R. 157); that the Bank was at all times thereafter in full and exclusive possession of the property, paying the taxes thereon and improving the same (R. 157-159), undoubtedly with the full knowledge of petitioners. The record also shows that during the entire time from the filing of the foreclosure suit to the time of the trial of the instant case petitioner Grace Schmidt resided continuously in the Village of Woodlawn in Jefferson County, about three miles from the mortgaged premises

(R. 158-159), and during the same period petitioner Leaffia Howe lived within one-half mile of said premises (R. 135). The evidence further discloses that when the foreclosure suit was filed petitioner H. Glen Wood lived just across the highway from the mortgaged property and continued to live there until March, 1938 (R. 133), and must have known that the Bank had gone into possession of the property during February, 1938. The record also shows that William C. Wood, father of petitioners and one of the defendants in the foreclosure suit, was living on the mortgaged premises when that suit was filed and continued to live there during the redemption period, and that he and his son (H. Glen Wood) held a public sale some time in February, 1938, and moved off the premises (R. 131, 157).

The record in this case further shows that during the redemption period following the Master's sale on September 5, 1936, no one made any offer to the Master to redeem the premises from the sale (R. 147), and that neither during that period nor at any time thereafter did the petitioners herein, or any of the defendants in the foreclosure suit, offer to redeem the premises from the Bank (R. 158), and that from the date of the Master's deed of December 9, 1937, until the filing of this suit none of the petitioners herein, nor anyone else, questioned the Bank's right to possession of the property (R. 158).

As previously mentioned, the evidence in this case shows that after the execution of the Master's deed to the Bank and some time during the latter part of February, 1938, the defendants in the foreclosure suit (including all the petitioners herein) voluntarily surrendered possession of the property to the Bank (R. 157), and that the Bank at all times thereafter had full and exclusive possession of the property, paying the taxes thereon (R. 157-159). Such surrender of the premises to the Bank obviously constituted an acquiescence in, and a

waiver of any and all objections to, the foreclosure proceeding on the part of the defendants therein (including all the petitioners herein) and amounted to a complete abandonment of any and all claim to the property. In *Walker v. Warner*, 179 Ill. 16, which was a suit to redeem from a mortgage foreclosure sale, the Supreme Court of Illinois, in considering the abandonment of the premises by the claimant of the right of redemption, said (page 27):

> "The equity of redemption cannot be enforced where there has been an attempted foreclosure, and all parties have supposed that the foreclosure was good, and the holder of the equity of redemption has abandoned the premises and all claim to them, never paying any taxes or offering to redeem until after a series of years, when the property has passed through many hands for full value and has become valuable (*Mulvey v. Gibbons, supra*)."

Petitioners stood by for five years from the date of the Master's sale and until the property had greatly enhanced in value as the result of the discovery and production of oil thereon, and until after large expenditures of money had been made in developing the land for oil production, before filing this suit seeking to redeem from said sale. In view of the facts hereinbefore set forth, and such long and inexcusable delay, the petitioners were palpably guilty of laches and acquiescence and barred from maintaining this suit, and must be considered as having waived and abandoned any and all claim to the property in question.

For decisions of this Court on laches and as to the necessity for prompt assertion of rights or claims with reference to property which is of a speculative character or which is subject to rapid, frequent and violent fluctua-

tions in value, as in the case of an oil property, see *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587, 23 L. Ed. 328; and *Hayward v. The Eliot National Bank,* 96 U. S. 611, 24 L. Ed. 855.

Conclusion.

In conclusion, respondents respectfully submit that for the reasons hereinbefore set out, this Court is without jurisdiction to review this cause, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE G. GILBERT, JR.,
J. HARMAN GILBERT,
MOSES PULVERMAN,
Attorneys for Respondent First National Bank of Woodlawn, Illinois.

JEWELL I. DILSAVER,
RUSSELL B. JAMES,
Attorneys for All Other Respondents (Kingwood Oil Company et al.).

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 550

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD R. ADAMS,
JOSEPH C. LAMY,
One North La Salle Street,
Chicago, 2, Illinois,
HUGH V. MURRAY, JR.,
Centralia, Illinois,
Attorneys for Petitioners.

THE DUNHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 550

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

Petitioners,

vs.

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS.

The brief of respondents charges that the petition for certiorari contains inaccuracies, omits material facts. Respondents have set forth a number of controverted facts not material to any issue and presented and argued issues which have never before been raised. The effect is to divert attention from the genuine issues and the simple ultimate facts by which they are presented. For that reason petitioners submit this brief reply and adopt the titles and sub-titles employed by respondents.

I.

JURISDICTION.

Under this heading respondents charge that petitioners failed in their jurisdictional statement to indicate that any question was raised concerning the order of January 10, 1938 approving the Master's report of conveyance filed on December 9, 1937 and allege that that order constituted an implied approval and confirmation of the Master's report of sale which had been on file since October 1, 1936, citing the opinion of the Supreme Court of Illinois in this case as authority therefor. It was not this so-called order, but the failure and refusal of the Supreme Court of Illinois to adjudge this so-called order void because it was no order and because it was entered without notice which gives rise to the federal question submitted to this Court herein.

Respondents further charge that the petitioners did not even mention this so-called order in their complaint in the trial court; but they admit that the existence of such an order was put in issue in the trial court by the answer of respondents and the reply of petitioners in which petitioners denied that any order of court was entered approving said report of conveyance or that if the same was approved, that it was never approved by an order of court, and denied that the purported order constituted an approval of the Master's report of sale (Rec. 102, 117, 118). And the opinion of the Supreme Court of Illinois establishes for certainty that the question was not only raised in that Court, but decision was made thereon, by reason whereof no further specification was necessary.

II.

STATEMENT OF THE CASE.

Under this heading respondents charge that petitioners' statement of the case contains inaccuracies and omissions and follow the charge with five pages of statements of facts and issues which are unimportant and have no tendency to clarify the central issues submitted for adjudication. An issue is created over the service by publication upon the petitioner, George F. Wood and wife, although there is no issue in that regard. Further, it is alleged, on page 4, that petitioners' claim that no notice was given to H. Glen Wood or his attorney with respect to any proceedings or orders in the foreclosure case subsequent to the public sale of September 5, 1936 and his right to such notice are all mere conclusions without support in the record. The veiled inference is that there was proof in the record that some notice was given. At no time have respondents offered to prove or pointed to anything in or out of the record of the foreclosure suit which might tend to establish that formal or actual notice of any proceedings subsequent to the public auction held on September 5, 1936 was given or received. In no brief or pleading filed by any of respondents has there been so much as a suggestion of an assertion that such a notice was given or received. At the trial counsel not only made no effort to prove formal or actual notice but sought in every way to prevent proof that no actual notice was in fact given (Rec. 192). It is axiomatic that where formal notice is required in a legal proceeding the burden of proof with respect to the giving of such notice is upon the party required to give the notice.

Among the material facts alleged by respondents to have been omitted by petitioners is the statement, on page 6 of the brief of respondents, that after December 9, 1937

the defendants in the foreclosure suit (including all the petitioners herein) voluntarily surrendered possession of the premises to the Bank some time during the latter part of February, 1938. This statement is predicated upon an assertion by respondents' witness, Morton Wood, which was a pure conclusion and was immediately refined by him so as to destroy entirely the value of the assertion. The testimony of the witness on this point, in full, was as follows:

> "The defendants yielded up possession of it voluntarily. At the time the foreclosure suit was filed W. C. Wood lived on the mortgaged premises. He was the father of the plaintiffs in this action. He continued to live there during the redemption period. He and his son held a public sale some time in February, 1938, and moved off." (Rec. 157.)

Respondents seek to infer that Petitioner, H. Glen Wood, must have in some way acquired some knowledge with respect to the false Master's report of sale by stating, as a material fact, on page 7, that H. Glen Wood moved to Mount Vernon, Illinois, in the same county (Jefferson) in March, 1938, and that county continued to be his home and voting place up to the time of trial of this suit below, but omit to add that in June, 1938, H. Glen Wood moved to Manteno, in Kankakee County, Illinois, where he was still living at the time of the trial and has never moved back to Mount Vernon, although he has been back (Rec. 133).

It is universally held that notice to one tenant in common is not notice to co-tenants (Freeman on Co-Tenancy, Para. 171; *Wait* v. *Smith*, 92 Ill. 385, 393; *Babcock* v. *Wells*, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848; *Strickland* v. *Capital City Mills*, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426). It is also universally held that it is not possible for one tenant in common to bind his co-tenants by any act or admission (*Omaha & G. Smelting & Ref. Co.* v.

Tabor, 13 Colo. 41, 21 P. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Anderson* v. *Acheson*, 132 Iowa 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217; *Williams* v. *Bruton*, 121 S. C. 30, 113 S. E. 319).

Respondents further allege, on page 7 of their brief, that the respondent Bank after going into possession of the property made some improvements thereon. The improvements consist of re-roofing the house and barn (Rec. 158). Respondents further allege, on page 9, that certain expenditures by way of drilling, equipping and operating costs on five wells were made up to February 28, 1942, presumably to create the inference that substantial expenditures had been made prior to the institution of this suit. This would be an unfair and untrue inference. It is to be noted that respondents refrain from making any statement that any expenditures were made on this account prior to the institution of this suit.

III.

ARGUMENT.

Federal Question.

Respondents argue, on pages 13 *et seq.*, that the allegations in petitioners' complaint in the trial court were insufficient to present a federal question for decision or to meet the statutory requirements because petitioners made no reference to the Constitution of the United States nor did they adopt the phraseology of the due process clause of either the 5th or the 14th amendments or use any language bearing the remotest similarity to such phraseology, and that by reason thereof the allegations are inadequate to show by clear and necessary intendment that a federal right was being asserted or to make known to the Court that it was being called upon to adjudicate any federal right, title, privilege or immunity and extensively quote from the opinion in two cases where the issues were such that no federal question was involved unless the federal question was specifically invoked by the litigants. It is, however, to be noted that the opinion in the F. G. Oxley Stave Co. case recognized the true rule as contended for by petitioners and well established by the decisions of this Court in *Bridge Proprietor* v. *Hoboken Land and Improvement Co.*, 1 Wall. 116, 143, 17 L. Ed. 571, 575, and *St. Louis Iron Mountain and Southern Railway Company* v. *Starbird*, 243 U. S. 592, 598, 61 L. Ed. 917, 922. Each of these decisions follows the opinion of Mr. Justice Storey in the case of *Crowell* v. *Randall*, 19 Pet. 368, and summarizes the circumstances under which this Court will review the decisions of State Courts as follows:

* * * * *

> "Third. That it is not necessary that the question should appear on the record to have been raised and

> the decision made in direct and positive terms *ipsissimis verbis,* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment * * *."

Respondents next, on page 17, repeat the contention that no question has been raised by petitioners with respect to the so-called order of January 10, 1938 approving the Master's report of conveyance filed on December 9, 1937 or lack of notice in connection therewith, and that since this order amounted to a confirmation of the Master's report of sale on file since October 1, 1936, no federal right has been set up or claimed with respect thereto. This argument ignores the fact that issue thereon was created by the pleadings in the trial court (Rec. 102, 117, 118) and decision made thereon by the Illinois Supreme Court and that respondents have never claimed that any notice of the application for this so-called order was ever given and took the position during the trial that notice was unnecessary and immaterial (Rec. 192).

Because great reliance is placed on this so-called order of court may we suggest the following pertinent considerations which will bring the character and effect of this subject into sharper focus: First, the decision of the Supreme Court of Illinois in this case is the first case in that or in any other jurisdiction which holds that the property of a mortgagor may be taken from him by an order of court induced by fraud entered without notice to him and without affording to him an opportunity to be heard. Second, there is no decided case in Illinois or in any other jurisdiction other than the opinion of the Supreme Court of Illinois in this case to the effect that the approval of a report of conveyance amounts to a confirmation and approval of a sale where prior thereto such confirmation and approval has been withheld or, in fact, has been expressly

refused as was done in this case (see minutes of the Circuit Court of Jefferson County entered and stricken on July 22, 1937, Abst. 323). Third, the so-called order of January 10, 1938 is not, in fact, an order of court but a mere memorandum on the docket, transcribed by the clerk, and does not bear the signature of the judge as is the universal practice in equity cases in Illinois. Fourth, if this so-called order of January 10, 1938 actually had the effect of approving and confirming the Master's report of sale filed October 1, 1936, why was it necessary for counsel for respondents to apply for and for the court to enter the purported order of June 10, 1941 approving the Master's report of sale and immediately thereafter to obtain a fresh, new Master's deed to the property? Fifth, the foreclosure decree contemplated the filing of a report of sale (Rec. 219) and the confirmation thereof (Rec. 221) and this decree was the law of this case upon which petitioners had the unquestioned right to rely.

Respondents have also set forth quotations from the brief of petitioners in the Illinois Supreme Court which is not in the record in this case, said quotations consisting of "Errors Relied Upon for Reversal" and "Propositions of Law" and argue that no federal question was presented to the Illinois Supreme Court. It is to be noted that they refrain from references to the portions of the brief in which lack of notice required by the amendments of the Constitution is argued. It will also be noted that the federal question was necessarily involved in the decision of the Illinois Supreme Court with respect to all of the errors relied upon for reversal and in all of the propositions of law except I.

Cases are cited by respondents in support of their contentions with excerpts therefrom and we have examined each of these cases and they wholly fail to negative the existence in the instant case of a federal question or the

availability thereof for review by this Court. In fact, *Brinckerhoff, Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114, and a separate portion of the opinion in that case were cited by petitioners in their petition for certiorari and is considered by petitioners to be an authority contrary to the interpretation therefor urged by respondents.

We have been unable to find the statements on pages 35 and 37 of the petition for certiorari which are citicized by the respondents on page 24 of their brief, but the statements might as well have been made and the criticism is apparently designed to persuade the Court that if the Master in Chancery presented the orders in question, he would not be required to serve notice upon attorneys of record. The mere statement of the proposition demonstrates the sophistry.

Respondents next complain that the record filed with this Court does not purport to be complete and that the certificate of the Clerk of the Supreme Court of Illinois does not state that it is a complete transcript of the record in the case. This objection does not merit extended notice. Section 7 of Rule 38 permits the use of the printed record below, supplemented by such additions as may be necessary to show the proceedings in the Illinois Supreme Court and the opinions there. The requirements of the rule have been met.

IV.

NON-FEDERAL GROUNDS IN THE DECISION OF THE ILLINOIS SUPREME COURT.

Under this heading respondents argue that there is no federal question in the instant case because the decision of the court below was based entirely on non-federal grounds, but respondents are unable to justify the decision of the court below on these non-federal grounds except by citing the opinion of the Illinois Supreme Court in this case. These grounds were discussed in the petition for certiorari and need not be reviewed here. However, respondents cite *Speck* v. *Pullman Palace Car Co.*, 121 Ill. 33; *Davies* v. *Gibbs*, 174 Ill. 272, and *Barnes* v. *Henshaw*, 226 Ill. 605, as authorities for the proposition that the confirmation of sale in the foreclosure suit is conclusive as to all matters upon which the Court might have passed had the parties brought these matters forward as objections to the confirmation. The rule there laid down has reference to objections which were not urged in opposition to a motion for confirmation. In no one of these cases was there any question as to fraud or lack of notice or opportunity for hearing which are the vices which pervade the confirmations in issue herein.

Respondents next assert that there is no showing of fraud or unfairness to prevent plaintiffs from redeeming within the statutory period and that petitioners could have redeemed at any time within twelve months from the sale. This argument assumes the point in issue. It disregards the uncontroverted fact that petitioners had no notice or knowledge that the Master in Chancery, acting in concert with his office associate, counsel for First National Bank of Woodlawn (Rec. 152), had filed a false and fraudulent report of sale. In the absence of such knowledge there was

no reason why H. Glen Wood was required to do other than reply upon his status as a successful bidder and to assume that he would have notice and an opportunity to make good his bid before the sale could be set aside and as long as H. Glen Wood knew that he was the successful bidder at the sale there was no reason why he would have been activated to make any inspection of the court files which would necessarily be a prerequisite to the detection of the false report and the filing of objections thereto. The lack of notice in connection with the approval of the false report had the effect of depriving him of the ability to take any action for his own protection and by the time the false report had been approved the statutory period of redemption had expired. Such was the further fraudulent device by which the rights of petitioners were abridged.

Respondents further mention that no offer of redemption was made by petitioners until five years after the sale. Presumably the inference respondents seek to create is that this delay amounts to laches, but respondents cite no authorities to rebut the authorities submitted by petitioners that in the application of laches an indispensable element is that the party charged must have had knowledge of the facts, and the doctrine will not be applied where the party against whom it is sought to charge laches was, in fact, in ignorance of material facts connected with his right and relating thereto.

V.

THE RECORD WITH RESPECT TO LACK OF NOTICE.

Under this heading the argument of respondents amounts to an assertion that since the record in the foreclosure suit is silent on the question of whether or not notice was served in connection with the orders approving

the Master's report of sale and report of conveyance and there is no proof in the record to the contrary, the presumption must be indulged that the notices were served. Put in other words, the contention is that inasmuch as no notice was served and by reason thereof no proof of notice appears in the record, therefore the record demonstrates that notice was, in fact, served. It is respectfully submitted that this contention when reduced to its logical conclusion is an obvious absurdity. The absence of the notice from the record in the case is evidence that no notice was, in fact, served. At no time during the proceedings have the respondents ever contended that a notice was served, and in their argument under this heading respondents deny that a notice was required. Furthermore, during the trial of this case counsel for the respondents objected to the introduction of evidence tending to show that no actual notice was received by petitioners on the ground that the question as to whether there was actual notice was entirely immaterial (Rec. 192). Finally counsel for respondents, it will be noted, do not under this heading assert that notice, in fact, was given.

Respondents next argue that when a judgment of a court of general jurisdiction is attacked collaterally every presumption is indulged in favor of the validity of the proceedings and the court's jurisdiction, unless it affirmatively appears on the face of the record that the court was without jurisdiction. But the presumption in favor of jurisdiction is a rebuttable presumption. *Forrest* v. *Fey*, 218 Ill. 165, 170, cited by respondents; *Swearengen* v. *Gulick*, 67 Ill. 208, 212; *Hemmer* v. *Wolfer*, 124 Ill. 435, 440; *Clark* v. *Thompson*, 47 Ill. 25, 27; *Donlin* v. *Hettinger*, 57 Ill. 348, 353; *Johnson* v. *Johnson*, 30 Ill. 215, 223. This presumption is rebutted in the instant case by a lack of notice in the record or any finding in the alleged order approving

the foreclosure sale or the so-called order approving the Master's report of conveyance to the effect that such notice was given or served or that counsel was present in open court at the hearing thereon.

Having argued that the record in the case fails to show that there was non-compliance with the rule of the Circuit Court of Jefferson County with respect to notice, respondents next argue (page 33) that the offer of petitioners to prove that they had no actual notice with respect to the proceedings in the foreclosure suit subsequent to September 6, 1936, was insufficient because the offer of proof did not specifically include the attorney for H. Glen Wood. However, in the court below the objection to this offer of proof was on the ground of materiality and the objection was sustained (Rec. 192). No objection was there taken to the form of the offer of proof. It is respectfully submitted that the form of the offer is not a material issue in the case since it is a well recognized proposition that the attorney of record in a case is the agent of the client for all procedural purposes in the case and that knowledge on the part of the agent is chargeable to his principal, by reason whereof the offer of proof mentioned and quoted on page 33 of respondents' brief (Rec. 192) necessarily would include knowledge on the part of such attorney. Curious it is that this issue with respect to the form of the offer of proof, once deemed immaterial by respondents, is now deemed so material as to raise an issue for the first time in this Court which has not been raised heretofore. For this reason alone, if for no other, it is submitted that the contention is untenable.

VI.

RESPONDENTS WERE NOT AND ARE NOT BONA FIDE PURCHASERS.

The answer of respondents in this section does not attempt to demonstrate how the defense of bona fide purchaser is available to any one claiming through a void deed, decree or order. Since all proceedings subsequent to the public sale of September 5, 1936, at which H. Glen Wood became the purchaser, and the Master's deeds were void, the defense of bona fide purchaser is not available to any of the respondents and must be disregarded. In their argument respondents elaborately review the evidence, but fail to cite a single authority to the contrary of the above proposition.

VIII.

LACHES.

The brief of respondents under this heading does not attempt to demonstrate that petitioners had actual knowledge of the wilful misstatement of facts contained in the Master's report of sale which was filed on October 1, 1936, except to argue that petitioners were necessarily put on notice and inquiry which should have led to immediate full knowledge. However, no evidence is cited or authorities submitted to this effect. Since under the authorities cited by petitioners in the petition for writ of certiorari it is an indispensable element in the application of laches that the party who is sought to be charged therewith must have had knowledge of the facts and that the doctrine will not be applied where the party against whom it is sought to charge laches, is *in fact*, in ignorance of material facts con-

nected with his rights, petitioners are not chargeable with laches with respect to the period of nearly five years during which the false Master's report of sale was pending and undisposed in the court files. Thus, even though it be conceded for the sake of argument that they received the necessary knowledge on June 10, 1941, when the alleged order approving the false Master's report of sale was entered, a period of less than ninety days intervened between the acquisition of such knowledge and the institution of legal proceedings on their behalf. In order for laches to intervene, it is necessary that the delay be for a period of time unreasonable under the circumstances. Respondents cite *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 23 L. Ed. 328, and *Hayward* v. *The Eliot National Bank,* 96 U. S. 611, 24 L. Ed. 855, as to the necessity for prompt assertion of rights or claims with reference to property which is of a speculative character. In each of these cases, however, the complaining party had contemporaneous knowledge of the facts and delayed his action nearly four years in *Twin-Lick Oil Co.* v. *Marbury* and nearly three and one-half years in *Hayward* v. *The Eliot National Bank.*

Conclusion.

It is regrettable that the contents of the brief of respondents necessitated discussion with respect to facts and issues of law which are not of substantial importance in this case, but in view of the peculiarity of the facts in the case it was not deemed advisable to allow these assertions with respect to the facts and contentions of law to go unchallenged.

It is respectfully submitted that upon the record in this case ample grounds for the granting of the petition for writ of certiorari have been established and that upon hearing

of this cause the judgment of the Supreme Court of Illinois and of the Circuit Court of Jefferson County should be reversed.

Respectfully submitted,

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
Attorneys for Petitioners